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44

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

FROM JUNE 28, 1913, TO MARCH 16, 1914

6 12/30/21 **OFFICIAL REPORT**

VOLUME 48

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1914

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JUSTICES
OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**
THE HON. SYDNEY SANNER, }

OFFICERS OF THE COURT:

D. M. KELLY, Attorney General.
W. H. POORMAN, Asst. Attorney General.
J. H. ALVORD, Asst. Attorney General.
CHAS. S. WAGNER, Asst. Attorney General.
JOHN T. ATHEY, Clerk.
MARSHALL N. RACE, Marshal.
AUGUST C. SCHNEIDER, Court Stenographer.

ATTORNEYS AND COUNSELORS AT LAW.

Admitted from October 23, 1913, to May 20, 1914.

ADAIR, HUGH R., January 26, 1914.

ANTON, CHAS. J., January 23, 1914.

ARMSTRONG, JAS. J., March 30, 1914.

ATKINSON, DENT, February 16, 1914.

AYER, LESLIE J., February 28, 1914.

BECKETT, HOWARD P., November 17, 1913.

BESSIE, AARON I., May 4, 1914.

BLAISDELL, ARTHUR M., February 24, 1914.

BOND, H. O., March 16, 1914.

BRINSON, JAS. M., November 24, 1913.

CHILD, WALTER E., November 10, 1913.

CRAGO, GEO. C., December 16, 1913.

DILLAVON, ROSCOE C., April 20, 1914.

EATON, WILLIAM R., November 10, 1913.

EBERLE, J. L., January 30, 1914.

EICKEMEYER, HERBERT R., April 6, 1914.

FOOT, STANLEY R., January 30, 1914.

GARDNER, DUNCAN, January 14, 1914.

GEE, HOWARD C., April 13, 1914.

GROENEVELD, JOHN A., January 27, 1914.

HAGERMAN, H. E., December 30, 1913.

HANSON, HANS, November 10, 1913.

HAWVER, OTHO R., March 2, 1914.

HIBBARD, WILLIAM P., April 20, 1914.

HOFFMAN, HARVEY B., January 5, 1914.

HOLSOPPLE, GUY, April 6, 1914.

HOOVER, W. H., February 9, 1914.

HUNT, D. EUGENE, March 2, 1914.

KNIGHT, J. B. C., December 6, 1913.

KOTZ, OTTO B., May 4, 1914.

KYLLO, H. L., February 24, 1914.

LAVELL, CLARENCE D., January 3, 1914.

MARIS, CHAS. F., January 31, 1914.

McKENZIE, JOHN J., February 9, 1914.

MERRICK, IVAN E., December 27, 1913.

MOORE, HARRY C., April 20, 1914.

MURCH, C. W., November 17, 1913.

PADBURY, GEO., JR., January 12, 1914.

PARCELLS, MAYO L., November 3, 1913.

PARKS, WADE R., March 30, 1914.

PAUL, SPURGEON E., December 15, 1913.

ATTORNEYS AND COUNSELORS AT LAW.

BORICK, E. E., November 7, 1913.
ROSCOW, LYMAN J., December 30, 1913.
ROSENBERG, ABRAHAM, May 11, 1914.
RUFFCORN, GEO. W., January 2, 1914.
RYAN, THOS. B., January 17, 1914.

SCHNELLSACHER, JOHN W., December 6, 1913.
SMITH, ELLSWORTH G., December 27, 1913.
SMITH, LARUE, December 26, 1913.
STREVER, WILLIAM J., December 27, 1913.

TERRETT, JULIAN, November 7, 1913.
THOMPSON, THOS. G., March 2, 1914.
TRACY, M. O., May 20, 1914.
TRIMBLE, PERRY D., January 23, 1914.

VOLLMER, JOS. G., April 6, 1914.

WADDELL, JOHN L., November 24, 1913.
WARREN, D. C., December 30, 1913.
WASNER, WENDELL H., December 19, 1913.
WEGNER, NELS C., November 3, 1913.
WIEDMAN, R. H., January 30, 1914.
WILLIAMS, SIMON P., December 11, 1913.
WILMARTH, EARL P., April 27, 1914.
WOLD, EDGAR O., December 26, 1913.
WOOD, P. J. E., January 2, 1914.

DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA.
1914.

FIRST JUDICIAL DISTRICT.

County of Lewis and Clark. County Seat, Helena.
District Judges: Hon. James M. Clements; Hon. J. Miller Smith.
Officers: County Attorney, Andrew H. McConnell, Esq.
Clerk of District Court, F. L. Reece.
Sheriff, Rolla Duncan.

SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.
District Judges: Hon. Michael Donlan; Hon. J. J. Lynch; H
J. B. McClernan.
Officers: County Attorney, Joseph J. McCaffery, Esq.
Clerk of District Court, John J. Foley.
Sheriff, Timothy Driscoll.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.
District Judge: Hon. George B. Winston.
Officers of Deer Lodge County (County Seat, Ar
County Attorney, Thomas P. Stewart, —
Clerk of District Court, M. L. McDer
Sheriff, Myles Kelly.

Officers of Powell County (County Seat, Deer Lodge) :

County Attorney, T. F. Shea, Esq.

Clerk of District Court, Robert Midtlyng.

Sheriff, Jos. E. Neville.

Officers of Granite County (County Seat, Philipsburg) :

County Attorney, David M. Durfee, Esq.

Clerk of District Court, Wm. B. Calhoun.

Sheriff, Daniel A. McLeod.

FOURTH JUDICIAL DISTRICT.

Counties of Missoula, Ravalli and Sanders.

District Judges: Hon. A. L. Duncan; Hon. R. Lee McCullough;

Hon. John E. Patterson.

Officers of Missoula County (County Seat, Missoula) :

County Attorney, Dan. J. Heyfron, Esq.

Clerk of District Court, Thos. P. Conlon.

Sheriff, W. L. Kelley.

Officers of Ravalli County (County Seat, Hamilton) :

County Attorney, Jas. D. Taylor, Esq.

Clerk of District Court, J. T. Coughenour.

Sheriff, George See.

Officers of Sanders County (County Seat, Thompson Falls) :

County Attorney, Gerald Young, Esq.

Clerk of District Court, Wm. Strom.

Sheriff, Wm. Moser.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Joseph B. Poindexter; Hon. W. A. Clark.

Officers of Beaverhead County (County Seat, Dillon) :

County Attorney, Roy S. Stephenson, Esq.

Clerk of District Court, Chas. W. Conger.

Sheriff, Daniel V. Erwin.

Officers of Jefferson County (County Seat, Boulder) :

County Attorney, J. E. Kelly, Esq.

Clerk of District Court, W. B. Hundley.

Sheriff, P. J. Manning.

Officers of Madison County (County Seat, Virginia City) :

County Attorney, Geo. R. Allen, Esq.

Clerk of District Court, Matt Carey.

Sheriff, Elijah Adams.

SIXTH JUDICIAL DISTRICT.

Counties of Park, Stillwater and Sweet Grass.

District Judge: Hon. Albert P. Stark.

Officers of Park County (County Seat, Livingston) :

County Attorney, Vard Smith, Esq.

Clerk of District Court, Wm. Pethybridge.

Sheriff, John Killorn.

Officers of Stillwater County (County Seat, Columbus) :

County Attorney, B. E. Berg, Esq.

Clerk of District Court, Guston Iverson.

Sheriff, Robert Guthrie.

Officers of Sweet Grass County (County Seat, Big Timber)

County Attorney, R. S. Steiner, Esq.

Clerk of District Court, H. C. Pound.

Sheriff, O. A. Fallang.

SEVENTH JUDICIAL DISTRICT.

Counties of Custer, Dawson, and Richland.

District Judge: Hon. C. C. Hurley.

Officers of Custer County (County Seat, Miles City) :

County Attorney, C. R. Tisor, Esq.

Clerk of District Court, Jas. G. Ramsay.

Sheriff, Hugh R. Wells.

Officers of Dawson County (County Seat, Glendive) :

County Attorney, J. A. Slattery, Esq.

Clerk of District Court, H. A. Sample.

Sheriff, J. D. Wynn.

***Officers of Richland County (County Seat, Sidney) :**

County Attorney, Herbert H. Hoar, Esq.

Clerk of District Court, Guy L. Rood.

Sheriff, Geo. W. Arkle.

EIGHTH JUDICIAL DISTRICT.

Counties of Cascade, Teton, and Toole.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls) :

County Attorney, W. H. Meigs, Esq.

Clerk of District Court, Geo. Harper.

Sheriff, Louis H. Kommers.

Officers of Teton County (County Seat, Chouteau) :

County Attorney, D. W. Doyle, Esq.

Clerk of District Court, James Gibson.

Sheriff, K. McKenzie.

†Officers of Toole County (County Seat, Shelby) :

County Attorney, W. M. Black, Esq.

Clerk of District Court, Perry Day.

Sheriff, G. R. Malone.

NINTH JUDICIAL DISTRICT.

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney, Justin M. Smith, Esq.

Clerk of District Court, W. L. Hays.

Sheriff, W. S. Evans.

*County of Richland created on May 27, and attached to seventh judicial district on June 3, 1914, by proclamation of the governor.

†County of Toole created, and attached to the eighth judicial district on May 7, 1914.

TENTH JUDICIAL DISTRICT.

County of Fergus. County Seat, Lewistown.

District Judge: Hon. Roy E. Ayres.

Officers: County Attorney, Charles J. Marshall, Esq.

Clerk of District Court, James L. Martin.

Sheriff, Firmin Tullock.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

District Judge: Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell):

County Attorney, X. K. Stout, Esq.

Clerk of District Court, Sam. D. McNeely.

Sheriff, A. J. Ingraham.

Officers of Lincoln County (County Seat, Libby):

County Attorney, Jas. M. Blackford, Esq.

Clerk of District Court, Timothy Miller.

Sheriff, Frank R. Baney.

TWELFTH JUDICIAL DISTRICT.

Counties of Blaine, Chouteau, Hill, Sheridan and Valley.

District Judges: Hon. John W. Tattan; Hon. Frank N. Utter.

Officers of Blaine County (County Seat, Chinook):

County Attorney, D. L. Blackstone, Esq.

Clerk of District Court, A. W. Ziebarth.

Sheriff, Isaac Niebaur.

Officers of Chouteau County (County Seat, Fort Benton):

County Attorney, H. S. McGinley, Esq.

Clerk of District Court, Geo. D. Patterson.

Sheriff, I. M. Rogers.

Officers of Hill County (County Seat, Havre) :

County Attorney, V. R. Griggs, Esq.

Clerk of District Court, Geo. W. Glass.

Sheriff, H. E. Loranger.

Officers of Sheridan County (County Seat, Plentywood) :

County Attorney, Paul Babcock, Esq.

Clerk of District Court, L. J. Onstad.

Sheriff, Jack Bennett.

Officers of Valley County (County Seat, Glasgow) :

County Attorney, John L. Slattery, Esq.

Clerk of District Court, Walter Shanley.

Sheriff, Patrick Nacey.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Musselshell, Rosebud, Yellowstone, and Big Horn.

District Judges; Hon. Geo. W. Pierson; Hon. Chas. L. Crum.

Officers of Carbon County (County Seat, Red Lodge) :

County Attorney, F. P. Whicher, Esq.

Clerk of District Court, H. A. Simmons.

Sheriff, W. H. Gebo.

Officers of Musselshell County (County Seat, Roundup) :

County Attorney, G. J. Jeffries, Esq.

Clerk of District Court, W. G. Jarrett.

Sheriff, J. L. Fisco.

Officers of Rosebud County (County Seat, Forsyth) :

County Attorney, Henry V. Beeman, Esq.

Clerk of District Court, D. J. Muri.

Sheriff, Wm. Moses.

Officers of Yellowstone County (County Seat, Billings) :

County Attorney, Robt. C. Stong, Esq.

Clerk of District Court, Lorin T. Jones.

Sheriff, John C. Orrick.

Officers of Big Horn County (County Seat, Hardin) :

County Attorney, C. F. Gillette, Esq.

Clerk of District Court, Frank A. Nolan.

Sheriff, Dewey Riddle.

FOURTEENTH JUDICIAL DISTRICT.

Counties of Meagher and Broadwater.

District Judge: Hon. John A. Matthews.

Officers of Meagher County (County Seat, White Sulphur Springs) :

County Attorney, C. A. Linn, Esq.

Clerk of District Court, F. H. Mayn.

Sheriff, Robt. Menzies.

Officers of Broadwater County (County Seat, Townsend) :

County Attorney, Chas. P. Cotter, Esq.

Clerk of District Court, Fred Bubser.

Sheriff, Chas. B. Doggett.

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SUPREME COURT RULES.

For Rules of the Supreme Court of the State of Montana, see
44 Mont. xxv.

ERRATA.

On page 28, line 3 of paragraph 3 of syllabus, read "elective" for
"election."

On page 196, line 2 of paragraph 3 of syllabus, read "extent" for "in-
tent."

On page 401, line 1 of paragraph 7 of syllabus, read "evidence held
sufficient" for "evidence held insufficient."

(xxix).

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
JUNE TERM, 1913.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,
THE HON. SYDNEY SANNER,

} **Associate Justices.**

MICHALSKY, RESPONDENT, v. CENTENNIAL BREWING CO.
ET AL., APPELLANTS.

(No. 3,260.)

(Submitted May 21, 1913. Decided June 28, 1913.)

[134 Pac. 307.]

Personal Injuries—Master and Servant—Unguarded Machinery—Negligence — Proof — Evidence — Instructions—Jury—Inspection of Premises—Presumptions—Special Interrogatories—Discretion—Excessive Verdicts.

Personal Injuries—Contributory Negligence—Complaint—Sufficiency.

1. Allegations of complaint in a personal injury action *held* not to bring the pleading within the rule that where it appears that plaintiff's own act was a proximate cause of his injury, facts must be alleged showing his freedom from negligence in acting as he did when injured.

Contracts—Rescission—When Available.

2. A rescission is available where a contract has been made and the consent of the party seeking it actually had, but given by mistake or obtained through duress, menace, fraud or undue influence.

Personal Injuries—Master and Servant—Release—Tender—Pleading.

3. Where plaintiff in a personal injury action alleged in his reply that if, as set up in the answer, he signed a writing releasing defendant from any liability in consideration of \$50, he did so at a time when he was under the influence of opiates and incapable of assent, he may

not be said to have been seeking a rescission of the contract of release so as to make it incumbent upon him to make a more definite tender of the amount said to have been received by him than he did when he averred that "if the said money was paid for such purpose, he now offers and tenders to defendant the return of said sum."

Same—Evidence—Weight for Jury.

4. Plaintiff's evidence, though unsupported and opposed by the statements of a large number of defendant company's witnesses, *held* sufficient, if credited by the jury, to support a verdict in his behalf.

Same—Negligence in Several Particulars—Proof.

5. Plaintiff who charges negligence in several particulars need not sustain the charge as to all; if actionable negligence is shown in any one of the respects alleged, it is sufficient.

Same—In Service of Master, When.

6. Plaintiff, an employee in and about a brewery, who had been directed to assist in loading beer kegs and lend a hand as required, at the time he was injured was engaged in the service of his master when at the request of a teamster he picked up a pot of paste needed to restore a stamp on a keg before shipping.

Same—Instructions—To be Viewed How.

7. Instructions must be considered as a whole; hence, where the various defenses interposed by defendant in a personal injury action were treated in separate paragraphs of the charge, the contention that by this method the jury were led to infer that defenses not referred to in a particular paragraph were not in the case had no merit.

Same—Instructions—Effect of Evidence.

8. Where weaker and less satisfactory evidence is offered when stronger and more satisfactory is within the power of the party, that offered should be viewed with distrust, is a fundamental canon of proof, and an instruction embodying it is not open to objection.

Same—Instructions—Discovery of Danger—Duty of Servant.

9. A workman, when ordered from one part of the work to another, not being permitted to stop, examine and experiment for himself in order to ascertain if the place assigned to him is a safe one, an instruction that it was the duty of plaintiff to apprise himself of any danger which he could or ought to have discovered by proper examination was properly refused.

[The right of an employee, who accepts extrahazardous duties, to recover for personal injuries, is considered in the note in 97 Am. St. Rep. 884.]

Same—Jury—Inspection of Premises—Presumptions.

10. Where, at the request of defendants (appellants), the jury were taken to view the machinery, then said by the former to be in the same condition as at the time of the accident, it will be presumed on appeal, in the absence of evidence to the contrary, that, in returning a verdict in favor of plaintiff, they found the machinery to have been unguarded as charged by plaintiff.

Same—Special Interrogatories—Discretion.

11. The submission of special interrogatories in personal injury actions, such as whether the place at which the accident occurred was reasonably well lighted, etc., though commendable practice, is nevertheless within the discretion of the trial court, and therefore refusal to submit is not subject to correction on appeal.

Same—Excessive Verdicts.

12. Where plaintiff, by reason of a personal injury, sustained an incurable deformity and suffered permanent impairment of earning capacity as a laborer, a verdict for \$7,150, *held* not excessive.

Appeal from District Court, Silver Bow County; J. Miller Smith, Judge of the First Judicial District, presiding.

ACTION by Paul Michalsky against the Centennial Brewing Company, a corporation, and another. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Affirmed.

Messrs. Kremer, Sanders & Kremer, for Appellants, submitted a brief; *Mr. Louis P. Sanders* and *Mr. J. Bruce Kremer* argued the cause orally.

If dangers are obvious (and plaintiff so alleges), the law charges knowledge. The law does not require warning from the master where the dangers are obvious. It is the law that if danger be obvious, one may not excuse his own neglect by claiming he was forgetful or absorbed. "If the servant is conscious of the dangers, the fact that he forgets their existence and sustains an injury will not make the master liable." (20 Am. & Eng. Ency. of Law, p. 120 (8); *Disano v. New England Steam Brick Co.*, 20 R. I. 452, 40 Atl. 7; *Commercial Guano Co. v. Neather*, 114 Ga. 416, 40 S. E. 299; *Paoline v. J. W. Bishop Co.*, 25 R. I. 298, 55 Atl. 752; *Gallagher v. Snellenburg*, 210 Pa. 642, 60 Atl. 307; *Morewood Co. v. Smith*, 25 Ind. App. 264, 57 N. E. 199.)

The application of elemental rules to the allegations of fact in the complaint stamps it as defective in substance. If a servant knows of the dangers of his work or in the exercise of reasonable care might have known them, he is deemed to have assumed the risk. When a risk is perfectly obvious, knowledge is by law inferred. Nor do all the allegations of the complaint, undoubtedly inserted to justify an argument that plaintiff did not assume the risks because of the claimed change in the nature of his duties, assist this complaint, for it becomes wholly immaterial that he was ordered to perform more hazardous duties, when the allegations of the complaint are recalled which admit that the dangers of the new employ-

ment were obvious. (*Worthington v. Goforth*, 124 Ala. 656, 26 South. 531; *Kentucky Freestone Co. v. McGee*, 118 Ky. 306, 80 S. W. 1113; *North Chicago St. R. R. Co. v. Conway*, 76 Ill. App. 621; *Dickenson v. Vernon*, 77 Conn. 537, 60 Atl. 270.)

If plaintiff went to work in a dark room, under the conditions he testifies to, on a keg elevator that he knew was in operation, he assumed the dangers. If he had never worked there before and was called upon by the teamster to hand out the paste, he could not grope in the dark and when injured hold anybody liable for consequences except himself. Ordinary prudence demands that one procure a light before taking the chance of becoming entangled with a machine of this kind in operation. The law imposes a duty upon plaintiff which he flagrantly violated. (See instruction 15 in *Nelson v. Boston & Montana Consol. etc. Min. Co.*, 35 Mont. 223, 88 Pac. 785; *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Guinard v. Knapp-Stout & Co.*, 90 Wis. 123, 48 Am. St. Rep. 901, 62 N. W. 625.) Nor can plaintiff escape the full force of this obligation by reason of the contention that he was ignorant and inexperienced, for he does not by any sufficient competent evidence sustain the allegations.

The evidence on behalf of plaintiff is insufficient to justify the verdict or to support his contention that he was induced to execute the release through the fraud of defendants. In all cases where a party seeks to annul the effects of a release or settlement for claims for damages, such as was relied on by the defendant in this case, the law requires that the proof be clear, unequivocal and convincing before such instrument is rendered nugatory. (Story's Equity Jurisprudence, 141; *Barker v. Northern Pac. R. Co.*, 65 Fed. 460; *Kift v. Mason*, 42 Mont. 232, 112 Pac. 392.) Under the facts of this case plaintiff's unreasonable delay to seek a rescission is, in law, equivalent to an affirmation of the release and he is bound by it. (*Fahey v. Detroit United Ry.*, 160 Mich. 629, 125 N. W. 704.) Section 5065, Revised Codes, provides that a party must rescind promptly. He has not only failed to rescind promptly, but he has never rescinded

at all. His attempted rescission is at best a conditional one only, and, as we have shown, a rescission must be complete and entire; it cannot be made upon a contingency as plaintiff endeavors in his replies to make it, that is, a rescission provided certain things are shown. He admits enough to show that he knew about it long prior to the trial, and under any aspect of the case he retains the consideration, on top of which he recovers a judgment. (*Hoch v. Goodhart*, 31 Misc. Rep. 789, 65 N. Y. Supp. 223; *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107; *Mortimer v. McMullen*, 202 Ill. 413, 67 N. E. 20; *Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785; *Fowler v. Meadow Brook Water Co.*, 208 Pa. 473, 57 Atl. 959.) Upon plaintiff's own admissions, the attempted rescission was not made within a reasonable time, and the question is therefore one for the court so to hold. (*Martin-Barris Co. v. Jackson*, 24 App. Div. 354, 48 N. Y. Supp. 586; *Money Weight Scale Co. v. Woodward*, 29 Pa. Sup. Ct. 142.)

“What the jury may observe when sent out to view the premises in dispute can under no circumstances become evidence, nor can the jury take it into consideration otherwise than as affording them means to better understand and apply the evidence adduced.” (*Wright v. Carpenter*, 49 Cal. 607, s. c., 50 Cal. 556; *People v. Milner*, 122 Cal. 171, 54 Pac. 833; *Machader v. Williams*, 54 Ohio St. 344, 43 N. E. 324; *Close v. Samm*, 27 Iowa, 503; *City of Grand Rapids v. Perkins*, 78 Mich. 93, 43 N. W. 1037; *City of Detroit v. Detroit etc. Ry. Co.*, 112 Mich. 304, 70 N. W. 573; *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.)

That portion of instruction No. 7 to which defendants objected should not have been submitted to the jury, and it was error on the part of the trial court to overrule the objections made. Section 8028, Revised Codes, provides that juries are to be instructed in accordance with the provisions of this section on all proper occasions. The indiscriminate giving of this instruction is condemned by the courts, unless the case presents justifiable reasons, which did not appear herein. (*Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315; *People v. Cuff*, 122 Cal. 589, 55 Pac. 407;

People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; *Wood v. Los Angeles Traction Co.*, 1 Cal. App. 474, 82 Pac. 547.)

Plaintiff seeks to repudiate the release and still to retain the money paid under it. He has wholly failed to place defendants *in statu quo*. The rule requiring a party attempting to rescind a contract to do so completely and unconditionally is laid down in the case of *Barker v. Northern Pacific R. Co.*, 65 Fed. 460: "A party defrauded has his option, either to avoid the contract or abide by it, notwithstanding the fraud; but if he elect to rescind, he must do so *in toto*, and restore to the other party whatever he has received upon the contract." (*Wiley v. Howard*, 15 Ind. 169; *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Westhafer v. Patterson*, 120 Ind. 459, 16 Am. St. Rep. 330, 22 N. E. 414; *Johnson School Tp. v. Citizens' Bank*, 81 Ind. 515; *Russell v. Russell*, 63 N. J. Eq. 282, 49 Atl. 1081; *Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086; *Leake v. Ball*, 116 Ind. 214, 17 N. E. 918; *Krag-Reynolds v. Oder*, 21 Ind. App. 333, 52 N. E. 458; *Morrow v. Moore*, 98 Me. 373, 99 Am. St. Rep. 410, 57 Atl. 81; *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107.)

Mr. Alexander Mackel, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The respondent, Paul Michalsky, suffered personal injuries while in the employ of the appellant brewing company and brought this action to recover for the same. As detailed in the last amended complaint, the place of the accident and the manner of its happening are as follows: Near the southeast corner of the company's main building there was a platform from which the delivery wagons were loaded. This platform was about two and a half feet above the floor upon which the kegs or barrels of beer were placed for loading, and the kegs were raised from the floor to the platform by means of a lift. The lift consisted of endless chains to which were attached "cer-

tain long iron bars or hooks'' so adjusted as to take hold of the kegs or barrels and raise them; and these chains worked over two pulleys or rollers to which power was imparted by means of ''a certain belt, cogwheels, and gear.'' It is alleged that this mechanism, though dangerous, was negligently kept exposed and unguarded; that the place of its operation was insufficiently lighted; that the respondent had been employed for other and safer work in which simple tools and implements only were required and which did not take him near said mechanism; that he was unfamiliar with it; that on the morning of the accident he was ordered by his superior, the appellant Huddel, to leave the work for which he had been employed and to ''help load kegs of beer by means of the aforesaid elevator and hoist'' and to generally ''assist the teamsters in placing upon their wagons all such articles and things as were required by the teamsters to be placed thereon, and to do all other work which it was necessary and proper to do at and near the aforesaid belt, cogwheels, elevator, and hoist''; that he was unskilled, inexperienced, ignorant and uninstructed with reference to the dangers connected with this new work and did not realize them; that in the doing of it he was, as a matter of fact, in constant danger of being brought into contact with the loading mechanism and of being caught by it and injured; that no sufficient or any warning had been given him; that while in the course of this work he was handing some article to a teamster he came into contact with the rapidly moving belt, was caught by the hooks or bars and by them ''forcibly brought in contact with other portions of the machinery, instrumentalities, place, wheels and platform in such manner that he was greatly injured thereby.''

Separate answers were filed denying negligence and affirmatively pleading negligence on the part of the respondent, his assumption of risk, and that after the accident he did for a valuable consideration in money paid by the brewing company, ''and for the purpose of compromising any and all claims of damages,'' make, execute and deliver to the company a full release and satisfaction of all such claims and demands ''and did

further discharge" the company, its agents and employees, from any and all liability in the premises.

In his replies the respondent denied the negligence and assumption of risk imputed to him by the answers, disclaimed any definite recollection of the alleged release, and averred that if he signed anything of the kind he did so while suffering great pain from his injuries and while he was under the influence of opiates and without any understanding or appreciation of what was going on; that not until after the answers were filed and his counsel had inspected the alleged release was he informed of the fact that his signature had been obtained on or about May 14, 1909, to a writing in which for the sum of \$50 he purported to release all claims for damages on account of his injuries; that he was about that time visited by defendant Mueller and another, which visit was followed by a visit of his wife; that when his wife arrived he was in possession of \$50 which he "now believes was left in his possession by said Mueller"; that she took possession of said money, but "neither she nor this plaintiff knew that the said money was paid as a release in full or any release or satisfaction of plaintiff's claim for damages on account of injuries received as herein stated; and * * * that, if the said money was paid for such purpose, plaintiff now offers and tenders to defendants herein the return of said sum of \$50."

Upon the trial the verdict was for respondent and against the brewing company and Huddel, the damages being fixed at \$5,000. Judgment was entered accordingly. Motion for new trial was made and denied. From the judgment and from the order denying the motion for new trial, the brewing company and Huddel have appealed.

1. The first contention is that the complaint "fails to state [1] a cause of action under the rule laid down in *Cummings v. Helena etc. Reduction Co.*, 26 Mont. 434, [68 Pac. 852], holding that although the absence of contributory negligence need not be pleaded, if the complaint shows that plaintiff's own act was a proximate cause of the injury, it must also state his free-

dom from negligence in doing the act.” This rule has been applied by this court in too many cases to admit of doubt as to its existence or meaning. Most of these cases are collated in *Conway v. Monidah Trust*, 47 Mont. 269, 132 Pac. 26. A cursory review of them, together with the still later decision in *Nilson v. City of Kalispell*, 47 Mont. 416, 132 Pac. 1133, will demonstrate that the allegations of the present complaint do not bring it within the rule. (See, also, *Montague v. Hanson*, 38 Mont. 376, 99 Pac. 1063; *Hollenback v. Stone & Webster Eng. Corp.*, 46 Mont. 559, 126 Pac. 1058.)

2. It is also contended that the replies are insufficient because “plaintiff seeks conditionally to annul and rescind the release [2, 3] agreement relied upon by defendants,” and because a tender of the money received upon the execution of the alleged release is not sufficiently pleaded. We do not construe the replies as seeking a rescission, conditional or otherwise. A rescission is available where the consent of the party seeking the rescission was actually had, but was given by mistake or obtained under duress, menace, fraud, or undue influence. (Rev. Codes, sec. 5063.) To say that rescission is sought is to imply or assume that the party seeking it acknowledges the existence of something to rescind. But the burden of the replies is that if the signature of respondent was in fact procured to any release, it did not represent any assent or act of his mind; that he was at the time not possessed of capacity to assent; that in short there was no contract, and any paper writing purporting to be such should be disregarded. It is entirely beside the question to say that the plaintiff might have acknowledged the contract and sought a rescission upon the ground of fraud. He does not admit the contract, and, as one cannot rescind a contract that he has not in fact made, so one cannot be assumed to seek a rescission where his position negatives the idea of any contract to be rescinded.

So as to the \$50 which he admits he found himself in possession of when his wife came, following the visit of Mueller. He “now believes” that Mueller left it, but he did not know that

it was left as payment for any release, and, if it was so left, the return of it is offered. That on the theory of a rescission this would be insufficient as a tender or a restoration to the other party of the benefits received need not be gainsaid; but, if there was no contract to rescind, the principle invoked by appellants has no application; and if, as a matter of fact, the money was a gratuity or was not paid or received as consideration for the release, no return at all was due. In the absence of an admission that the money was paid and received as consideration for the release, and upon the respondent's plea of uncertainty as to who left it and why it was left, we think the replies went quite as far as any rule of good faith in pleading could require.

3. The sufficiency of the evidence to justify the verdict is questioned. Judging from the cold record, it would seem that, [4] as regards all the essentials of liability, the appellants had met and overcome the respondent at every point. Against the bare testimony of respondent, four witnesses testified that it was light at the lift when the accident occurred; four that respondent had worked at this lift several times prior to the accident; three that he had been specifically warned of the danger of coming into contact with the mechanism; two that he actually stepped upon the revolving shaft; and five that after the accident he was conscious and stated that it was due to his own fault. Just why the jury in the first instance, and the trial court on the motion for a new trial, deemed the unsupported testimony of the plaintiff to be superior in weight, force, efficiency or influence to the mass of definite testimony against it, we can only conjecture. It is true that the testimony on behalf of the appellants was given by persons who were or had been in the employ of the appellant company; there was testimony also to the effect that before Mueller and his companion appeared at the hospital on May 14, the occupied cot next to respondent's was moved and an unoccupied one put into its place; that a screen was then placed about respondent's cot; and that pills and injections were administered to him, which

had the effect of making him dizzy, sleepy and without appreciation of what was taking place. It may be that the jury believed all this and believed that it was designed to make it easier to secure from the respondent a release of all claims on account of the serious injuries he had sustained, for the pittance of \$50. If they so believed, it was not entirely illogical that they should then discount the value and credibility of all the rest of appellants' case. In any event, the weight of the evidence was for the jury, and we may not disturb their conclusion, if it is supported by evidence sufficient, if credited, to sustain the charge. (*Mattison v. Connerly*, 46 Mont. 103, 126 Pac. 851; *Robinson v. Cole*, 46 Mont. 140, 126 Pac. 850.) It was not necessary that the plaintiff should sustain the charge of [5] negligence as to all of the particulars pleaded, but it is sufficient if actionable negligence was shown in any of the respects alleged. (*Riley v. Northern Pac. R. Co.*, 36 Mont. 545, 93 Pac. 948; *Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843.)

Now, the testimony of plaintiff is to the effect that he was hired by Mueller to move machinery, which occupation was pursued at a point remote from the keg lift; that he was later put to washing vats; that he had never worked with the keg lift until the morning of the accident; that he had no familiarity with it whatever and no warning of its dangers was given him; that the light in the place was poor; that he was ordered to work at the lift by Huddel, who told him to hurry up and help load kegs and do whatever else might be required; that he was kept busy loading kegs upon the hooks or bars above described; that he had no opportunity to observe the machinery closely and did not know or realize its points of danger; that after he had been there ten or fifteen minutes someone on the loading platform called for the paste, and while respondent was picking up the pot of paste he was struck by a belt which he had not before seen, pushed or dragged into the lift, and injured. All this is within the allegations of the complaint, and it is idle to say that it does not establish negligence *prima facie* or

that contributory negligence or assumption of risk must necessarily be inferred. (*McCabe v. Montana Central R. Co.*, 30 Mont. 323, 76 Pac. 701; *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29; *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724; *Stewart v. Pittsburg & Montana Copper Co.*, 42 Mont. 200, 111 Pac. 723; *Forquer v. North*, 42 Mont. 272, 112 Pac. 439.)

The suggestion is made that when respondent was picking up [6] the pot of paste he was not engaged in the business of his employer. We think he was. He had been directed by Huddel to assist in loading and to lend a hand as required. A stamp or label had fallen from one of the kegs; it had to be restored before the keg could go out; and the paste was needed to restore it. In procuring it the respondent was not merely complying with the request of a teamster for paste, but he was doing something necessary to be done in and about the loading of the beer and executing the general orders which had been given him. Appellants attempt to meet this by asserting that Huddel himself was a mere fellow-servant and not a superior; but we cannot give serious consideration to this in view of the allegations of the answers and of the extent of his power and authority as disclosed by the evidence before us.

It is further said: "The evidence on behalf of plaintiff is insufficient to * * * support his contentions that he was induced to execute the release through the fraud of defendants." What is said above touching this subject as affected by the pleadings applies here. The contention is not that he was induced to execute the release through the fraud of defendants, but that he did not execute it at all and did not accept any money for any release. His evidence is consistent with that position and sufficient, if true, to support it.

4. Error is assigned on the giving of instructions 6, 7, and Z. Instructions 6 and 7 read as follows: "(6) You are instructed that an employer must indemnify his employee, except as prescribed in the next instruction, for all that he necessarily loses in the direct consequence of the discharge of his duties as such,

or of his obedience to the directions of the employer." And "(7) You are instructed that an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risk of the business in which he is employed." These instructions are substantially a reproduction [7] of sections 5242 and 5243, Revised Codes, and of course no error could be predicated upon the giving of them in a proper case, with the proper limitations. The point made against them is that the exception made in instruction 6, to-wit, the condition described in instruction 7, is directed to the assumption of risk alone, leaving no room for the defenses of contributory negligence or release from liability, and that instruction 7 does not define what ordinary risks are; in other words, these instructions tell the jury, in effect, that regardless of the release, if given, or of contributory negligence, if shown, the plaintiff should recover unless the accident was due to the ordinary risks of his employment, whatever they may have been. With equal propriety it might also be added that instruction 6 does not even require that the employer should have been negligent. We think that, considering these instructions alone, there is force in appellants' contention, although the language in instruction 6 that the loss for which the employee will be indemnified must be "in the direct consequence" of the discharge of his duties implicitly excepts contributory negligence. As a general rule, it is excellent practice to follow the statute in framing instructions, taking care that the language is adapted to the needs of the given case. Had the court made the exception in instruction 6 broad enough to cover all the instructions, there could have been no criticism; but if it would defeat a recovery by the employee that the employer was not negligent, or that the employee was negligent, or that the employee released the employer, then clearly instructions 6 and 7 were inadequate. The instructions, however, must be taken as a whole (*Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45), and it is incredible that the jury could have been misled by the merely negative inference to be drawn from instructions 6 and 7, when they were told in

positive terms by instruction 1 what the issues were, including the special defenses of contributory negligence and the release; by instruction J that, to warrant a recovery, the accident must have been due to some act of negligence alleged in the complaint; by instruction 9 that, if the release was signed in consideration of the sum of \$50 which the respondent kept and used after learning that it was paid to him for that purpose, "he cannot now recover in this action"; by instructions U and V that, if the respondent was guilty of contributory negligence, "he cannot recover in this action"; and by the various other instructions what the risks, ordinary and extraordinary, were which, under any possible theory of the case, the respondent could be held to have assumed. Jurors are presumed to have average intelligence and to employ it. No man possessing or employing average intelligence could infer from the instructions as a whole that the defenses of non-negligence, contributory negligence, and release by contract were not in the case. We are therefore disinclined to direct a reversal merely because of the verbal misprision in instructions 6 and 7.

The giving of instruction Z was entirely proper. The statutory provisions touching the effect of evidence should be given [8] in every case. The doctrine that, "if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory is within the power of the party, the evidence offered should be viewed with distrust" is a fundamental canon of all proof. In no case can it be a valid objection to it that any particular party is put by the court under the imputation of having withheld the best evidence available—that is for the jury to say. If in fact he has not, he cannot be adversely affected by the instruction; and, if he has, his is just the case for which the rule was made.

5. There was no error in the refusal of offered instruction K. [9] It asked the court to tell the jury that it was the duty of respondent to apprise himself of any danger which he could "or ought to have discovered by the proper examination" of the machinery. We have repeatedly held that a workman, when

ordered from one part of the work to another, cannot be allowed to stop, examine and experiment for himself in order to ascertain if the place assigned to him is a safe one. (*Kallio v. Northwestern Improvement Co.*, 47 Mont. 314, 132 Pac. 419; *Hardesty v. Largey Lumber Co.*, *supra.*)

6. So, also, the court properly refused to instruct the jury that there was no evidence that the machinery was unguarded, as requested by offered instruction X. The respondent says that when picking up the pot of paste he was struck and pushed by the belt, but a guarded belt could not have struck or pushed him. The appellants' witnesses say that he stepped upon the revolving shaft, and he could not have done this if the shaft was covered. All the testimony is that he was loading beer on the hooks attached to the endless chain, and these had to be open for that work to be done. This is evidence enough to furnish the basis for the application to the testimony of whatever the jury may have ascertained on their visit of inspection. At the request of appellants the jury were taken to view the premises [10] and machinery, which appellants said were in the same condition as at the time of the accident. What the jury saw we do not know; but the appellants who made the request cannot now complain if, in the absence of evidence to the contrary, this court indulge the presumption that the verdict is supported by evidence of the unguarded condition of the machinery, assuming that fact to be necessary to give verity to their conclusions. Concerning the effect to be given to an inspection, we adhere to what was said in *Ferris v. McNally*, 45 Mont. 20, 121 Pac. 889.

7. The court could very well have submitted to the jury the special interrogatory requested by the appellants: "Was the [11] place at and around the beer elevator reasonably well lighted at the time plaintiff was injured?" The submission of such interrogatories is to be commended, particularly in cases where the answers may be decisive. It has a tendency to keep the jury to the main issues and is often a great aid to this court in ascertaining the precise basis upon which the verdict is made

to stand. But the submission of such questions is always within the discretion of the trial court, especially where the answer may not necessarily determine the rights of the parties; hence the refusal is not subject to correction by us. (*Poor v. Madison River Power Co.*, 41 Mont. 236, 108 Pac. 645.)

8. After the motion for nonsuit was denied, appellants were permitted to plead and prove that since the accident the brewing company had paid to the respondent monthly sums aggregating \$2,100, and the fact that he has been awarded the further sum of \$5,000 is characterized as a miscarriage of justice. Granting that the amounts voluntarily paid by the brewing company were properly shown in mitigation, we cannot say that the jury ignored them. The respondent suffered grievous injuries; he has sustained an incurable deformity and his ability to do physical labor is permanently impaired. The grand total of the verdict and all that has been paid respondent is \$7,150. We have affirmed judgments for more than this for injuries in no wise more serious.

The assignments of error not disposed of by the above are either without merit or are too trivial for consideration as a ground of reversal.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

BROWN, APPELLANT, v. ERB-HARPER-RIGNEY CO. ET AL.,
RESPONDENTS.

(No. 3,346.)

(Submitted June 12, 1913. Decided June 28, 1913.)

[133 Pac. 691.]

*Receivers Pendente Lite—Evidence—Insufficiency—Refusal to
Appoint—When Proper.***Receivers Pendente Lite—Evidence—Insufficiency.**

1. A mercantile company made an assignment of its property for the benefit of its creditors. E. purchased the property from the assignee, executing and delivering to B., as trustee for the creditors, a mortgage as security, under the terms of which the proceeds were to be applied to a discharge of the claims of the creditors. Under the terms of sale E. had the right to sell the goods in the regular course of business, being required, however, to make a monthly accounting to the trustee. Alleging breach of the terms of sale, the trustee commenced suit against E. to foreclose the mortgage, and asked that a receiver *pendente lite* be appointed. *Held*, that refusal to appoint a receiver was proper, it appearing that the proceeds of sales were being applied to the purpose provided in the mortgage and that the creditors were not suffering or likely to suffer any substantial injury before final decree.

Same—Showing Necessary to Justify Appointment.

2. A receiver *pendente lite* should only be appointed upon a strong showing that such officer is necessary to preserve the property in controversy pending an adjustment of the ultimate rights of the parties.

[As to when the appointment of a receiver is proper, see the note in 72 Am. St. Rep. 29. As to the right of appointment before suit is instituted, see the note in Ann. Cas. 1912B, 236.]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by C. F. Brown, trustee, against the Erb-Harper-Rigney Company and others to foreclose a chattel mortgage. From an order refusing to appoint a receiver *pendente lite*, plaintiff appeals. Affirmed.

Mr. F. B. Reynolds, for Appellant, submitted a brief and made oral argument.

Under the law applicable, and especially in view of the circumstances of this particular case, the provisions that mortgagor should remain in possession of the stock of goods, sell the same

in the regular course of trade and account therefor constituted a personal covenant on the part of the mortgagor which could not be assigned. (Jones on Chattel Mortgages, 5th ed., par. 459; *Daggett v. McClintock*, 56 Mich. 51, 22 N. W. 105; *Barnard v. Eaton*, 56 Mass. 294.) It would seem clear, therefore, that when mortgagor Erb disposed of his entire interest in the personal property and completely severed his connection with the business, he violated both the spirit and the letter of the mortgage in question, was in default in one of the essential conditions of the mortgage, and that by reason thereof the mortgagee had the right to declare the whole amount of the indebtedness secured by the mortgage due and payable, and to commence this action of foreclosure.

When a mortgagor defaults in the conditions of his mortgage, his rights under such mortgage immediately cease, and the mortgagee has the right to have the mortgaged property preserved intact to satisfy his claim. Even though defendant Erb himself had been in possession of said property and was continuing the sale thereof in accordance with the terms of the mortgage, yet if he was in default by reason of his failure to comply with any other conditions of said mortgage whereby it might be foreclosed, his rights to so continue in possession and carry on the business would immediately terminate upon a forfeiture being declared by reason of such default, and the mortgagee would have the right to take possession of the property and hold it for the satisfaction of his claim. If, under such circumstances and after default, Mr. Erb should persist in continuing to sell the goods in the regular course of trade or otherwise, the court should appoint a receiver of the property to prevent him from so doing, so that the property might not be depleted, thereby materially injuring the security. Such appointment would be justified either under subsection 2 of section 6698, Revised Codes, or under subsection 6. This principle may be applied to the case at bar with equal, if not greater, force than if the assignment of the mortgagor's interest in the property in question had not been made. (See *State*

Journal Co. v. Commonwealth Co., 43 Kan. 93, 22 Pac. 982.) A receiver may be appointed to keep property *in statu quo*. (*H. B. Claflin Co. v. Furtick*, 119 Fed. 429.) Where the mortgage provides that the mortgagor is to remain in possession of the stock of goods and sell the same in the regular course of business, but he neglects so to do, a receiver may be appointed *pendente lite* even without notice. (*O'Donnell v. First Nat. Bank*, 9 Wyo. 408, 64 Pac. 337.) "Upon a breach of the conditions of a chattel mortgage, an absolute title to the property thereupon vests at once without possession, in the mortgagee." (Jones on Chattel Mortgages, sec. 699; *Heyland v. Badger*, 35 Cal. 404; *Mathew v. Mathew*, 138 Cal. 334, 71 Pac. 344; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 Pac. 243.) If, upon a breach of the conditions of a chattel mortgage, the mortgagee is entitled to immediately take possession of the mortgaged property, then it would seem clear that he would have the right to have the mortgaged property preserved intact to satisfy his claim against it, and if, instead of summarily taking possession, he chooses to foreclose his mortgage through the court, he would have the right to have a receiver appointed when it appears that without such an appointment a considerable portion of the property will be disposed of by piecemeal, so that it cannot be followed and the security be thus materially injured.

Messrs. O. F. Goddard and C. L. Harris, for Respondents, submitted a brief; *Mr. Goddard* argued the cause orally.

The record shows that the creditors, represented by the trustee, were secured by mortgage on real estate owned by Erb, in addition to the chattel mortgage, and neither the complaint in the foreclosure of chattel mortgage nor the petition for a receiver shows that the property mortgaged as security to the creditors is not ample security for the payment of the debts, and unless the petition shows upon its face a condition of affairs that would satisfy the court that the security is not ample, or that the debtors are insolvent, or that there is danger

of the mortgaged property being squandered or misappropriated, a court of equity would not allow the extraordinary remedy of a receiver to be invoked.

The doctrine has frequently been laid down by this and other courts, that the power of a court to appoint a receiver must be exercised with great care and the utmost caution, and with due regard for the interests, as well as the legal rights, of all parties sharing in the property. This language was used in the case of *Fluker v. Emporia City Ry. Co.*, 48 Kan. 577, 30 Pac. 18, and was quoted with approval by this court in the case of *Jacobs v. Jacobs Mercantile Co.*, 37 Mont. 321, 96 Pac. 723. This court in the same case quoted with approval from the case of *Hickey v. Parrot Silver & Copper Co.*, 25 Mont. 164, 64 Pac. 330, as follows: "The power to appoint a receiver is to be exercised sparingly, and not as of course. A strong showing should be made, and even then the authority must be exercised with conservatism and caution."

And in the same case this court quoted with approval from the case of *Benepe-Owenhouse Co. v. Scheidegger*, 32 Mont. 424, 80 Pac. 1024, as follows: "The appointment of a receiver is an extraordinary remedy, to be resorted to only in cases of emergency." This court in the same case quotes the text of Mr. High, in his work on Receivers, third edition, section 3, which announces the same principle in strong language. The appointment of a receiver is, to a considerable extent, a matter resting in the discretion of the court. (High on Receivers, 3d ed., sec. 7.)

In a suit to recover the possession of property, the appointment of a receiver to take possession of said property, pending litigation, is a matter resting in the judicial discretion of the court, and should be determined with a view to the protection of the rights of all parties. Such appointment should not be made, unless it appears that the property will otherwise be in danger, and that there is a reasonable probability that the claimant will ultimately prevail in the suit. (*Moore v. Bank of British Columbia*, 106 Fed. 574.) In matters involving the dis-

cretion of the lower court, this court will not interfere, especially when the evidence upon which the lower court based its decision is conflicting. (*Anaconda Copper Min. Co. v. Butte & Boston Min. Co.*, 17 Mont. 519, 43 Pac. 924; *Heinze v. Boston & M. Copper etc. Min. Co.*, 20 Mont. 528, 52 Pac. 273; *Parrot Silver & Copper Co. v. Heinze*, 25 Mont. 139, 87 Am. St. Rep. 386, 53 L. R. A. 491n, 64 Pac. 326, 21 Morr. Min. Rep. 232; *Craver v. Stapp*, 26 Mont. 314, 67 Pac. 937; *Macdonald v. Ger-rick*, 29 Mont. 372, 74 Pac. 1083.)

The petition for the appointment of a receiver in this case fails to show any sufficient grounds or reason therefor, and the evidence clearly shows that the business is being conducted in the same manner as it had been conducted prior to the change of possession of the mercantile concern, and that the change of possession has been acquiesced in by the trustee since the change, and that the present management has added nearly \$3,000 to the stock since taking it over, and is selling the property in the usual course of business, and applying the proceeds according to the terms of the mortgage, and the evidence further shows that there has been no conversion of the proceeds by the new management, and that there is no danger of any conversion or misappropriation. The record further shows that there has been no breach or default in the terms of the mortgage that would entitle the appellant trustee to foreclose the mortgage, and if he is not entitled to foreclose his mortgage by reason of the breach of some condition or conditions of the mortgage, or some default in the payment of the moneys thereby secured, then, certainly, no receiver to take charge of the mortgaged property would be appointed by a court of equity, pending foreclosure proceedings.

Counsel for appellant relies principally upon the failure of the mortgagor Erb to remain in possession of the said goods and chattels, and to dispose of them in the regular course of business, and allege in the complaint that it was with the distinct understanding that he was to so remain in possession of said stock of goods and carry on the hardware business in connec-

tion therewith. This is a gratuitous statement, there being no stipulation in the mortgage that Erb was to remain in possession of said stock of goods, and even if the terms of the mortgage could be so construed, the respondent has failed to allege any fraud or collusion of the parties, or any facts showing that the creditors have been, or will be, in any way injured by the conduct of the business under the present management, or that there has been, or is likely to be, any misappropriation of the property, or proceeds of the sale thereof, by the present management; all of the allegations in any way concerning this matter being simply statements of conclusions of law.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action to foreclose a chattel mortgage. This appeal is from an order of the district court refusing to appoint a receiver [1] *pendente lite*. On February 3, 1912, the defendant Erb-Harper-Rigney Company, a mercantile corporation doing business at Laurel, Yellowstone county, being financially embarrassed, made an assignment of all its property, real and personal, to George F. Clawson for the benefit of its creditors. Clawson immediately qualified as such assignee and entered upon the discharge of his duties. On June 8, 1912, under an order of the district court of Yellowstone county, the creditors of the corporation consenting thereto, the assignee sold and conveyed all the property to the defendant Erb, a stockholder and the manager of the corporation. The consideration of the sale was the assumption by Erb of the indebtedness of the corporation, amounting in all to \$24,450.87. Thereupon Erb executed and delivered to the plaintiff, as trustee for the benefit of the creditors and to secure the indebtedness due them, a mortgage upon certain real estate, including all owned by the corporation at the date of the assignment, and certain other belonging to Erb in his own right. He also, and for the same purpose, executed a chattel mortgage upon the stock of merchandise theretofore owned by the corporation, consisting of hardware, farming im-

plements, *etc.*, together with the bills receivable and accounts due it from its customers. The real estate mortgage, it seems, was to run for the period of two years, though this fact does not distinctly appear. The chattel mortgage contained this provision: "That said mortgagor shall remain in possession of and sell and dispose of the above-described goods and chattels in the regular course of business for the benefit of the mortgagee and that an accounting shall be made by the mortgagor to said trustee on the first of each and every month during the time this mortgage is in force, and the proceeds of the sales, after deducting the expenses of the business not to exceed \$150 per month together with taxes, insurance and the interest on a real estate mortgage held by E. Vaughn, of Laurel, Montana, for \$2,400, shall be turned over to said trustee by said mortgagor and shall be held by said trustee and shall be applied on said indebtedness by said trustee whenever the sums in his hands shall amount to 10 per cent of the total indebtedness." It describes the debts secured as evidenced in part by promissory notes, and in part by open accounts due and payable at different dates. It further provides: "In case of default in the payment of the aforesaid principal sums of money, or any part thereof, then it shall be optional with said party of the second part, the mortgagee, and obligatory on him at the request of a majority (in number and amount) of the creditors to consider the whole of said principal sums immediately due and payable, and immediately to enter in and sell all and singular the premises hereby granted, and to sell and dispose of the same and all benefit and equity of redemption of the said mortgagor according to law. * * *

It is further agreed by the parties hereto that at the expiration of this mortgage it shall be renewed for the period of one year from the date of expiration."

Upon the execution of the mortgages the defendant Erb took possession of the property and proceeded to sell the merchandise in the regular course of business. He continued to do so until June 22, 1912. On this date he sold to Fred. Darrow 51 per cent of his equity under the mortgages, and to defendant Rig-

ney 33 per cent, who, having assumed to discharge the debts secured thereby in proportion to the amounts of their respective shares, thereafter conducted the business under the firm name of Darrow & Erb. This arrangement was continued until October 1, when Rigney sold his interest to defendant Steele, who assumed Rigney's obligation. On January 22, 1913, Erb repurchased the interest theretofore sold to Darrow, and thereafter, on February 19, sold his entire interest to defendant Harris. This action was brought on April 11. At that time Steele and Harris owned and were in possession of the entire property subject to the mortgage.

The complaint, after making a statement substantially as above, alleges that from and after the transfer to Harris on February 19, Erb ceased to have any further interest in the business; that he has not been in the possession of the property, and has not rendered any accounting to plaintiff; that he has not paid the debts secured by the mortgage, or any part of them, except the sum of \$1,517.72; that the balance with interest is wholly due and unpaid, and that by virtue of the option contained in the mortgage, and upon request by a majority of the creditors, to whom is due the greater portion of the indebtedness, the plaintiff has elected to declare the whole thereof immediately due and payable. The prayer is for the usual decree in foreclosure, and for costs, including attorneys' fees.

The material allegations of the petition for the appointment of the receiver are substantially the following: That it was the understanding by the creditors, and it was part of the arrangement whereby the mortgage was given, that the defendant Erb was to give the business his personal attention and supervision; that the obligation assumed by him was personal to the creditors; that he has not continued in possession of the property as in the mortgage provided, but has sold it in bulk, and has ceased to have any interest therein or in the business; that the property has gone into the possession of defendants Steele and Harris; that through the sales made by him, Erb received a valuable consideration, for which he has failed to account to plaintiff;

that Steele is a resident of the state of Colorado; that neither he nor Harris is personally conducting said business; that these defendants are selling said property in the usual course of business, and will continue to do so unless a receiver is appointed; that by reason of said sales the mortgaged property will be materially injured; and that it is therefore necessary for the protection of the creditors that a receiver be appointed pending the action.

The hearing was had after notice, upon affidavits and oral testimony. While there was some controversy upon the question whether the dealings had by Erb with Darrow, Steele, Rigney and Harris were consented to by the plaintiff, the evidence shows clearly that Erb was never in the active conduct of the business, but that it was conducted by Rigney prior to the date of the assignment, and that it has been conducted by him since the execution of the mortgage, and this with full knowledge by the plaintiff and the creditors. Since Erb took charge under the mortgage, Rigney has been making sales in the usual way. Prior to Erb's sale to Steele and Harris, Rigney kept strict account of all transactions. He deposited the proceeds of sales to the credit of the plaintiff and Erb in strict accordance with their instructions, and they have been devoted by the plaintiff to the discharge *pro tanto* of the claims of the creditors. So, also, the evidence discloses that he was in charge for Harris and Steele, and was pursuing this course at the time this action was commenced. There has been no diversion or misappropriation of any of the property or proceeds of sale. The sales of the different interests by Erb were in fact all subject to the rights of plaintiff and the creditors, and were understood to be so both by himself and the plaintiff; the purpose in each case being to substitute the purchasers in Erb's place to carry out the terms of the mortgage contract. In none of the transactions did Erb receive any money, but merely exchanged his equity in the property for equities in real estate which was also subject to encumbrances. In short, Erb and the other defendants have faithfully observed all the terms of the mortgage, except that

Erb has not been at all times actually in physical possession of the mortgaged property and in personal management of the business. It is true that the net result to the creditors has not been large, only one small dividend having been paid to them during the year of 1912. This fact is explained by the statement of Rigney that when the mortgage was executed and he resumed charge under Erb, the season for the sale of farm implements for the year 1912 had passed, and hence that sales were limited exclusively to other portions of the stock. He expressed the opinion, however, that if the business should be allowed to go on without interference, the sales for the season of 1913 would produce funds enough to make substantial payment to the creditors. It will be observed that it is not alleged, either in the complaint or in the petition, that Erb is not entirely solvent and able to meet all the demands of the creditors, or that the real estate held under the other mortgages is not amply sufficient to secure them. The evidence does not disclose what the facts in this connection are. The breach of the contract alleged as the ground upon which foreclosure is sought is that the obligation assumed thereunder was personal to the creditors, and that Erb has failed to continue in possession of the property and give the business his personal supervision. Assuming that the plaintiff may, on this ground, maintain his action for foreclosure prior to the maturity of the mortgage, do the facts disclosed warrant the appointment of the receiver? The statute itself (Rev. Codes, sec. 6698), in our opinion, answers this inquiry in the negative. It requires a showing that the property is in danger of being lost, removed or materially injured. It will be noticed that the ground of the application is that by reason of sales being made by defendants, the mortgaged property may be materially injured unless a receiver is appointed. This statement is a mere bald conclusion and is without support in the facts proved. The mortgage itself provides for the sales just as they are being made. It was well known and understood at the time the mortgage was executed that the stock was not of sufficient value to secure all the debt.

edness. The very purpose of it was to have the business continue, and thus to preserve the value of the security. While the defendant Erb is not personally in charge of the business, sales are being made, and the proceeds are being devoted to the discharge of the claims of the creditors in strict conformity with the terms of the mortgage. Hence the creditors are not suffering any injury, nor is their security being impaired further than as a consequence of the depletion of the stock, a result which must necessarily follow from an observance of the terms of the mortgage; for it is provided therein that Erb shall sell the property and account for the proceeds. If this provision is observed, the creditors cannot suffer injury.

The remedy of a receivership, drastic and violent as it is in [2] effect, because it deprives the defendant *in limine* of the possession of his property, should not be allowed in any case except upon a statement of facts showing that it is necessary to prevent injury to the rights of the plaintiff pending the action. "The power to appoint a receiver is to be exercised sparingly and not as of course. A strong showing should be made, and even then the authority must be exercised with conservatism and caution." (*Hickey v. Parrot Silver & Copper Co.*, 25 Mont. 164, 64 Pac. 330.) "The appointment of a receiver is an extraordinary remedy, to be resorted to only in cases of emergency." (*Benepe-Owenhouse Co. v. Scheidegger*, 32 Mont. 424, 80 Pac. 1024.) The exercise of the power is lodged in the discretion of the court, but the discretion is not arbitrary. It must be exercised in conformity with the rule that a receiver is necessary as an auxiliary to the attainment of the ends of justice, by the preservation of the property in controversy pending an adjustment of the ultimate rights of the parties. (High on Receivers, 3d ed., sec. 19.)

Since it appears that the property involved here is being devoted to the purposes for which it was set apart by the parties, and that the creditors are not suffering, nor are liable to suffer, any substantial injury before final decree, we do not think the district court abused its discretion in denying the application.

The appointment of a receiver would serve no useful purpose, but would tend rather to impair the value of the security by subjecting it to the expense which is always a necessary incident of a receivership.

The order is affirmed.

'Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

STATE EX REL. LANG, RELATOR, v. FURNISH ET AL.,
COUNTY COMMISSIONERS, RESPONDENTS.

(No. 3,351.)

(Submitted June 23, 1913. Decided July 7, 1913.)

[134 Pac. 297.]

Mandamus—New Counties—Exclusion of Territory—"Qualified Electors"—Quasi-judicial Duties of Commissioners—Withdrawal of Signatures—Burden of Proof—Petitions—Protests—Date of Filing.

Words and Phrases—"Qualified Elector."

1. Unless otherwise indicated in the particular Act before a court for construction, the term "qualified elector" means one who possesses the qualifications prescribed by section 2, Article IX of the Constitution.

New Counties—Exclusion of Territory—Signers—"Qualified Electors"—Definition.

2. *Held*, under the rule declared in paragraph 1, *supra*, that by the expression "qualified electors," as used in section 2, Chapter 133, Laws of 1913, page 484, in the provision that a petition for the exclusion of territory from a proposed new county shall be signed by at least one-half of the qualified electors residing in such territory, such persons are meant who possess the necessary constitutional qualifications, and not electors whose names appear on the great register of voters.

Elections—Registration—Purpose of.

3. Registration is no part of the qualifications of an elector; it is merely a method of ascertaining who the qualified electors are, and thus to guard against abuses of the election franchise.

New Counties—Commissioners—Quasi-judicial Duties—Constitution.

4. The inquiry which the board of county commissioners is, by Chapter 133, Laws of 1913, page 484, required to make in ascertaining the number of qualified electors in territory sought to be excluded from a proposed new county, and whether at the time of the filing of the petition for exclusion, it contained the genuine signatures of one-half such

qualified electors, is *quasi-judicial* in character, and the exercise of its decisional faculty in this respect does not constitute an invasion of the constitutional provisions which lodge the judicial power of the state in its courts.

Same—Petitions for Exclusion of Territory—Evidence of Sufficiency.

5. In determining whether a petition for the exclusion of territory from a county proposed to be created was signed by 50 per cent of the qualified electors therein, the board of county commissioners may resort to whatever competent evidence it has at hand, including the great register of voters.

Same—Petitions—Withdrawal of Signatures Permitted.

6. In the absence of legislative expression to the contrary, signers of a petition may withdraw their names at any time before final action thereon; hence, the board of county commissioners erred in refusing to consider withdrawals from petitions theretofore filed asking the exclusion of certain territory from a proposed new county, such refusal being based upon the ground that the withdrawals of signatures, though filed before final action, had not been presented until after the date fixed for the hearing.

Same—Exclusion of Territory—Burden of Proof.

7. The burden of establishing the number of qualified electors residing in territory sought to be excluded from a proposed new county is upon the petitioners seeking exclusion, not upon the proponents of the new county.

Same—Petitions—When not *Prima Facie* Evidence.

8. Petitions seeking exclusion of territory from a proposed new county, unaccompanied by an affidavit to the effect that the signers are qualified electors resident in the particular territory, and constitute 50 per cent of such electors in it, may not be taken as *prima facie* evidence of such facts.

Same—Petitions—Date of Filing—When not to be Considered.

9. Under the New Counties Act (Laws 1913, Chap. 133, p. 484) the matter of the creation of a new county must be determined on the case as made upon the date fixed for the hearing (save as it may be affected by subsequent withdrawals before final action taken—see paragraph 6, *supra*); therefore, protests against its creation or petitions for the exclusion of territory from within its proposed boundaries filed after the date fixed for the hearing may not be entertained by the board of county commissioners.

Original application for *mandamus* by the state, on relation of William Lang, against Robert Furnish and others, commissioners of Custer county. Peremptory writ granted.

Messrs. Booth & Maiden, Mr. L. A. Conser, and Mr. P. C. Cornish, for Relator, submitted a brief; *Mr. Edwin S. Booth* argued the cause orally.

Messrs. Tisor & McKinnon, for Respondents, submitted a brief; *Mr. Carl R. Tisor* argued the cause orally.

Mr. Chas. S. Loud, appearing in behalf of the signers of the Wibaux and Ismay petitions for the exclusion of territory from the proposed new county of Fallon, who by order of the district court had been made parties respondent, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On April 10, 1913, a petition in due form, with signatures apparently sufficient, was presented to the board of county commissioners of Custer county, praying for the creation of a new county, to be called Fallon county. The board thereupon fixed May 1, 1913, at 10 o'clock A. M., as the time for hearing the proof of the petitions and of any opponents thereto, and directed the requisite notice to be given. On May 1, the requisite notice having been given, the board met for the purpose of the hearing, but for cause adjourned the same to May 7. On May 7 the board reconvened and proceeded with the hearing and concluded the same on May 13, 1913, with findings to the effect: That the petition for the creation of Fallon county was sufficient in form, substance, and signatories; that counter-petitions had been filed on May 1, seeking the exclusion of territory from the proposed new county, which were sufficient in form, substance, and signatories to require such exclusion; that, after excluding such territory, the valuation of all the property within the proposed new county was brought below \$3,000,000; and thereupon the board denied the petition and declined to call an election.

The entire proceeding was had under the provisions of Chapter 133, Session Laws of 1913, which we shall call the New Counties Act, and it is contended that the board did not give the proper legal effect to the counter-petitions in granting them, because they were not signed by 50 per cent of the qualified electors resident in the territory sought to be excluded. These counter-petitions are the Wibaux petition (Exhibits 1, 5 and 6), and the Ismay petition (Exhibit 3), filed on May 1, the date set for the hearing. The board in affirming their sufficiency proceeded upon the theory that no counter-petition, pro-

test or withdrawal made or attempted after May 1 could be considered, and that the term "qualified electors," 50 per cent of whom are required for the exclusion of territory under section 2 of the Act, means those electors residing in the territory sought to be excluded whose names appeared on the great register at the date fixed for the hearing. So proceeding, the board declined to entertain certain additional counter-petitions filed after May 1 for the exclusion of the same territory, certain protests against the creation of the new county filed after May 1, certain representations filed after May 1, to the effect that the persons signing the same had withdrawn their names from the counter-petitions for exclusion (Exhibits 1, 3, 5 and 6), and certain offers to prove, without regard to the state of the great register on May 1 that the number of qualified electors, under the Constitution and residing in the territory sought to be excluded, was greater than double the number of those whose signatures remained upon the counter-petitions for exclusion after allowing all withdrawals. And thus it is substantially agreed by all the parties hereto, the following questions are presented:

Is it the intent of section 2 of the New Counties Act that a counter-petition for the exclusion of territory shall be signed by 50 per cent of the persons residing in such territory who possess the constitutional qualifications of electors, or by 50 per cent of the electors residing in such territory who have registered?

Should the board upon the hearing eliminate from the counter-petitions for exclusion the names of those whose withdrawal was filed before the final action of the board but after the date fixed for the hearing?

May the board upon the hearing entertain a protest against the new county, or a counter-petition for the exclusion of territory, filed before the final action of the board but after the date fixed for the hearing?

1. Counsel for the respondent board, citing *Bergevin v. Curtz*, [1, 2] 127 Cal. 86, 59 Pac. 312, ingeniously argue that by "qualified electors" 50 per cent of whom must sign a counter-

petition for the exclusion of territory is meant those electors who have qualified themselves to vote by registering. They say, in effect, that a distinction is to be observed between "electors," as persons possessing the constitutional qualifications, and "qualified electors," as electors who have registered so as to be entitled to vote; and hence the board, in determining whether a counter-petition for exclusion is sufficient as to signatories, has but to resort to the very simple process of consulting the great register as of the date fixed for the hearing. There is support for this construction in *Hawkins v. Board of Supervisors of Carroll Co.*, 50 Miss. 735, and it is attractive as furnishing a solvent for many of the difficulties incident to the administration of this rather complex law. But the construction suggested cannot be approved for several reasons. In the first place, the language employed is, apart from historical considerations, of clear and accepted meaning. Save where otherwise indicated, the term "qualified elector" means one who possesses the qualifications prescribed by the Constitution as necessary to entitle him to vote (Const., Art. IX, sec. 2), and not simply a registered voter; for one may possess all the constitutional qualifications and still be unable to vote for want of that registration which is also authorized by the Constitution "as necessary to secure the purity of elections." (*White v. Reagan*, 25 Ark. 622; *Notaries Public, In re House Bill 166*, 9 Colo. 628, 21 Pac. 473; *Board of Commrs. v. People*, 26 Colo. 297, 57 Pac. 1080.) That this is the correct conclusion is manifest upon a general review of the various statutes bearing upon the subject. One example will suffice. By the great register law (Chap. 113, Twelfth Session Laws), the county clerk is required to register all qualified electors. If "qualified electors" means registered electors, the county clerk is required to register the registered electors. An observation of the various sections of the statute in which the terms "electors" and "qualified electors" are employed will disclose that the use of them is indiscriminate. It is a principle [3] long established that registration is no part of the qualifications of an elector and adds nothing to them; it is merely a

method of ascertaining who the qualified electors are, in order that abuses of the elective franchise may be guarded against. (Mont. Const., Art. IX, sec. 9; *Capen v. Foster*, 12 Pick. (Mass.) 485, 23 Am. Dec. 632; *State v. Butts*, 31 Kan. 537, 2 Pac. 618; *Wilson v. Bartlett*, 7 Idaho, 271, 62 Pac. 416; *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609.) Nor do we see anything in the context or purpose of the Act to warrant the inference that any other meaning was intended. The legislature could have said that a counter-petition to exclude territory should be signed by 50 per cent of the qualified electors thereof whose names appear upon the great register, but it did not say that, and the conclusion must be that it did not mean that, unless by such a conclusion the statute is rendered inoperative or unconstitutional. But it is possible for the board to do what the statute seems to require, viz., ascertain the number of qualified electors in the territory sought to be excluded, whether registered or not, and determine whether 50 per cent of them actually signed the petition for exclusion; and the mere fact that such an inquiry may be difficult, or that a construction of the Act different from its apparent meaning would work to advantage by simplifying the inquiry, affords no reason for doing violence to the language of the Act.

So, too, we may grant that for the board to do what the statute apparently requires it to do may sometimes demand qualifications of a high judicial order; still the inquiry is a preliminary one for administrative purposes only. It adjudicates no private right; establishes no precedent; settles no principle. The difference between such an exercise of decisional faculty and that involved in the common everyday affairs of the board is of degree merely and not of kind. It is of the character termed "quasi judicial" and constitutes no invasion of the constitutional provisions which lodge the judicial power of the state in its courts. (*State ex rel. Arthurs v. Board of County Commrs.*, 44 Mont. 51, 118 Pac. 804; *State ex rel. Jacobson v. Board of Commrs.*, 47 Mont. 531, 134 Pac. 291.) In *State ex rel. Bogy v. Board of County Commrs.*, 43 Mont. 533, 117 Pac. 1062, we

held that the board, in ascertaining whether the original petition for the creation of a new county is signed by one-half the number of electors whose names appeared upon the register for the preceding general election, must subtract from the whole number the names of all persons who since the election have lost their votes by death, removal, or other cause; in other words, the board must determine how many of those whose names appeared in the register for the preceding general election remain electors at the time the petition is filed. We can see no difference in kind between the duties thus imposed and those apparently imposed by the provision now under review.

There is another consideration which persuades us to the same conclusion. The language in question was brought forward into the present Act from the original Leighton Act (Twelfth Session Laws, Chap. 112). At the time the Leighton Act was passed, the law providing for the great register was not in existence; hence it cannot be said that the Leighton Act contemplated registration in the great register as an electoral qualification, or that the great register should be the sole, or any, basis upon which to determine the number of qualified electors resident in the territory sought to be excluded. Under the Leighton Act, if it became necessary to know the number of the qualified electors resident in any given locality, it was necessary for the board to resort to one or the other of the following courses: Either take the registration of the last preceding general election alone; or take the registration of the last preceding general election supplemented by proof *aliunde* of subsequent accessions and losses; or ascertain the fact by any means available. That the first of these courses was not the one in contemplation is clear from the language of the provision which then, as now, required the board to exclude territory "upon petition of not less than fifty per cent of the qualified electors thereof." This could refer only to the time when such petition was filed or presented; and to take the registration of the last preceding general election alone would of necessity exclude all qualified electors who had not registered for that election, as well as those who became

electors after that time, and would include those who since that time had ceased to be electors. So that either the second or third course must have been intended by the Leighton Act, and either of them presents, to a greater or less degree, the very embarrassments the avoidance of which is suggested as a ground for construing the same provision of the present law as referring to registered electors alone.

Our own conclusion is that under the Leighton Act, and under [5] the present Act, the provision in question requires the board to determine whether a petition for exclusion, at the time it was filed, contained the genuine signatures of one-half the qualified electors of the territory, regardless of registration, and that for such determination the board may resort to whatever competent evidence may be at hand, including the great register so far as it avails.

2. The counter-petitions for exclusion which were considered and granted, related to two different areas: the Wibaux territory (Exhibits 1, 5 and 6), and the Ismay territory (Exhibit 3). The board, confining itself to the great register as it appeared on May 1, found that there were 440 qualified electors residing in the Wibaux territory, and 161 in the Ismay territory. The counter-petition for the Wibaux territory, as filed, contained the names of 379 persons, of which number the board struck 92 because they did not appear upon the great register on May 1, thus leaving 287; from this number a further deduction of 35 was made, being the names of persons who had on May 1 filed their formal withdrawal; so that the final number which the board found to have been "fifty per cent of the qualified electors" in the Wibaux territory is 252. The counter-petition for the Ismay territory, as filed, contained the names of 123 persons, of which number the board struck 19 because they did not appear upon the great register on May 1, thus leaving 104; from this number a further deduction of 18 was made, being the names of persons who had filed their formal withdrawal on May 1, so that the final number which the board found to have been "fifty per cent of the qualified electors" in Ismay territory is 86. Upon these figures, if

the board had been justified in the several steps above detailed, its findings in favor of the counter-petitions were obviously correct, unless the further withdrawals of 35 names from the Wibaux counter-petition, and 6 names from the Ismay counter-petition, filed after May 1, but before final action upon these counter-petitions, should have been considered and allowed.

[6] The authorities on this subject are collated and discussed in admirable notes to *State ex rel. Andrews v. Boyden*, 15 Ann. Cas. 1122 [21 S. D. 6, 108 N. W. 897], and *Sim v. Rosholt*, 11 L. R. A. (n. s.) 372 [16 N. D. 77, 112 N. W. 50], and we think the rule well established that, in the absence of legislative expression to the contrary, signers of a petition have an absolute right to withdraw therefrom at any time before final action thereon. (*Slingerland v. Norton*, 59 Minn. 351, 61 N. W. 322; *State v. Geib*, 66 Minn. 266, 68 N. W. 1081; *Lippincott v. Carpenter*, 22 Idaho, 675, 127 Pac. 557; *Littell v. Board of Supervisors*, 198 Ill. 205, 65 N. E. 78; *La Londe v. Board of Supervisors*, 80 Wis. 380, 49 N. W. 960; *Mack v. Polecat Drainage Dist.*, 216 Ill. 56, 74 N. E. 691; *Hoffman v. Nelson*, 1 Neb. (Unof.) 215, 95 N. W. 347; *Irwin v. Mayor etc. of Mobile*, 57 Ala. 6; *Misener v. Wainfleet Tp.*, 46 U. C. Q. B. 457.) Indeed, the above rule is a necessary inference from the very nature of the right of petition, and of necessity applies, not merely to the petitions themselves, but to the withdrawals, so as to authorize the withdrawal of a withdrawal.

We are not unmindful of the inhibition contained in the New Counties Act (to be later discussed) against the consideration of petitions and protests filed after the date fixed for the hearing; but a withdrawal is neither a petition nor a protest, and we are convinced that the board was clearly in error in refusing to consider the withdrawals in question.

The suggestion is before us that the exclusion of these withdrawals, if error, was not prejudicial to the proponents of the new county. We cannot understand this. It was the duty of the respondent board to give to the counter-petitions for exclusion the legal effect to which they were entitled. (*State ex rel. String-*

fellow v. Board of Commrs., 42 Mont. 62, 111 Pac. 144.) This it could not do without knowing the number of the qualified electors in the affected areas at the time the counter-petitions were filed; and this it could not know by reference to the great register alone, and no other evidence was received.

The proponents of the new county, challenging the sufficiency of the counter-petitions, offered to prove that there were 473 qualified electors in the Wibaux territory, and 172 in the Ismay territory. These offers, though broad enough as alleged in the petition for the writ of mandate, seem to have been based upon the notion that registration after May 1 is sufficient proof of electoral *status* on May 1, which is not correct. (*State ex rel. Bogy v. Board of Commrs.*, *supra.*) But the conclusion reached by the board cannot be aided by any infirmity in the offer of [7] the proponents, because the burden was not on them to establish the number of qualified electors in the area sought to be excluded. That burden was upon the counter-petitioners, and the failure was theirs if, after such evidence as they chose to present, or the board to procure, had been heard, no finding sufficient to support the counter-petitions was possible upon the facts proved. Neither is the matter aided, so [8] far as we can tell, by assuming the number of qualified electors in the affected areas to be as stated in the offer of proof, or by the fact that the board may or may not have erroneously stricken the 92 names from the Wibaux petition, and the 19 from the Ismay petition. Other than the great register, no evidence whatever was taken of the *status* of the persons whose names appeared upon the counter-petitions; as to 77 of them not even that evidence was before the board. In *State ex rel. Arthurs v. Board of County Commrs.*, *supra*, we said: "While it does not appear from the face of the counter-petition that it is signed by at least 50 per cent of the qualified electors of the territory sought to be withdrawn, this fact is recited in the affidavit verifying the counter-petition, and this is sufficient *prima facie* showing of that fact." But there is nothing before us to indicate the manner in which the counter-petitions are veri-

fied, if at all. This, of course, does not affect the validity of the counter-petitions as such, since the act does not seem to require that they be verified; but they cannot be taken as *prima facie* evidence that the signers are qualified electors of the territory affected, or that they constitute 50 per cent of the qualified electors of the territory sought to be withdrawn, without an affidavit to that effect.

It does not follow, from what we have said, that the findings of the board as to the number of qualified electors of the territory sought to be excluded and as to what proportion of such electors had signed the counter-petitions, were wrong, but merely that there was no legal basis for them or any findings. This it must secure in order that the proceedings may go forward to whatever end may be proper.

3. The New Counties Act provides that, upon the filing of a [9] petition for the creation of a new county, the board shall "fix a date to hear proof on the said petitions and any opponents thereto," and at the time so fixed "shall proceed to hear the petitioners and any opponents, upon the petition or protests filed on or before the time fixed for the hearing; no petition or protests shall be considered unless the same is filed on or before the time fixed for the hearing." So far as any additional petitions for the creation of the new county or any protests against it are concerned, the above language clearly intends that the case shall be considered as made on the date fixed for the hearing. Nor do we encounter any difficulty in applying the same rule to counter-petitions for exclusion of territory whether they be couched in the language of protest or not. A counter-petition for exclusion is a petition and is so denominated in the Act. The inhibition is against all petitions and protests filed after the date fixed for the hearing, and the mere fact that the board is "upon the final hearing" to exclude territory does not warrant the inference that two hearings are intended, or that counter-petitions for exclusion filed after the date fixed for the hearing are to be considered, or that the sufficiency of those filed upon the date fixed for the hearing ought to be determined as of the date of the

hearing. We think the language intends that the entire matter shall be heard and the proofs taken upon the case as made upon the date fixed for the hearing, save as affected by subsequent withdrawals before final action, and that if, when the evidence is all in, it shall appear that, on or before the date fixed for the hearing, counter-petitions for exclusion were filed which, after allowing all withdrawals, still contain 50 per cent of the qualified electors of the territory involved therein, then the territory affected by such counter-petitions shall be excluded. If we understand the record aright, the respondent board was clearly correct in this portion of its proceedings.

Other questions than those above discussed are suggested in the briefs or have occurred to us in passing. They are not, however, adequately presented by the record, and we refrain from discussing them.

While the relator is entitled to a peremptory writ of mandate, we cannot go to the extent demanded by him. The writ should issue to the respondent board of county commissioners of Custer county, directing them to reconvene within fifteen days after service of the writ and annul the order made by them on May 13, 1913, granting the counter-petitions (Exhibits 1, 3, 5, and 6), and thereupon to ascertain and find the number of the qualified electors resident within the territory sought to be excluded on the date the said counter-petitions were filed; to further ascertain and find how many of the persons who signed said counter-petitions for exclusion were qualified electors of the territory described therein at the time the said counter-petitions were filed, and whether, after allowing all withdrawals therefrom presented before the said order of May 13, the said counter-petitions contain the names of 50 per cent of persons who were qualified electors of such territory at the time the counter-petitions were filed; and if, so proceeding, the board shall find that both counter-petitions contain the genuine signatures of 50 per cent of the persons who were then qualified electors of the territory therein described, to grant the counter-petitions and deny the petition for the creation of the new county; but if, proceed-

ing as herein directed, the board shall find that either the Wibaux counter-petition (Exhibits 1, 5, and 6) or the Ismay counter-petition (Exhibit 3) does not contain the genuine signatures of 50 per cent of the persons who at the time it was filed were qualified electors of the territory therein described, to deny such counter-petition and (excluding the territory described in the successful counter-petition, if either be successful) take such further proceedings as are required by law to submit the question of the creation of Fallon county to the electors concerned; and it is so ordered. Writ forthwith.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

IN RE ROBERTS' ESTATE. ROBERTS, ADMR., RESPONDENT,
v. ROBERTS, APPELLANT.

(No. 3,272.)

(Submitted September 17, 1913. Decided October 6, 1913.)

[135 Pac. 909.]

*Probate Proceedings—Embezzling Assets of Estates—Order
Requiring Disclosure Nonappealable.*

1. An order requiring a person charged by an administrator with having concealed or disposed of assets of the estate represented by the latter, made after examination of the former pursuant to a citation issued in a proceeding instituted under sections 7505 and 7506, Revised Codes, to make disclosure as prayed, is not appealable.

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

IN THE MATTER of the estate of Martha Roberts, Stephen Roberts, as administrator, filed a petition praying citation against Willard Roberts to compel him to make disclosure of the disposition of goods and chattels belonging to the estate. From an order requiring the disclosure, defendant appeals. Appeal dismissed.

Messrs. Wight & Pew and *Mr. C. P. Cotter*, for Appellant, submitted a brief; *Mr. Chas. E. Pew* argued the cause orally.

Mr. E. H. Goodman, for Respondent, submitted a brief and made oral argument.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On June 22, 1912, Stephen Roberts, as administrator of the estate of Martha Roberts, deceased, filed his petition in the district court of Broadwater county—that court having jurisdiction of the administration—alleging that he believed, and had reason to believe, that one Willard Roberts had embezzled, conveyed away, and disposed of certain goods and chattels belonging to the estate, and praying that a citation issue requiring the said Roberts to appear and be examined on oath touching the property, and that the court order him to make disclosure to the petitioner of his knowledge thereof. In response to a citation issued upon the petition, Roberts appeared and answered, denying all the allegations in the petition, and alleging title to the property in himself. Thereafter an examination was had, and at its conclusion the court made an order requiring the disclosure to be made in accordance with the prayer of the petition. From this order, Willard Roberts has attempted to appeal as from a final judgment. During the oral argument in this court the question arose whether the appeal lies. If it does not, this court is without jurisdiction to determine it upon the merits, and hence must order a dismissal.

The proceeding was instituted under sections 7505 and 7506 [1] of the Revised Codes, which provide a means by which an executor or administrator may obtain a discovery of assets belonging to the estate of the decedent which have been concealed, embezzled, smuggled, conveyed away or disposed of by any person, or of knowledge of any deeds, conveyances, *etc.*, showing a claim or right of the decedent to any real or personal estate, or any claim or demand, or of a lost will of the decedent. These

provisions are remedial in their nature, and confer power upon the court, when sitting in probate proceedings, analogous in its scope and object to the power of a court in chancery upon bills of discovery. (*Mesmer v. Jenkins*, 61 Cal. 151.) The proceeding authorized by them is of an ancillary character, however, and is confined to securing a discovery of evidence upon which the administrator or executor may recover assets belonging to the estate which would otherwise be lost. The adjudication of disputed rights of property is not within their scope, for the order which section 7506 authorizes the court to make cannot go further than to require a disclosure which may be used in an action pending or to be brought in behalf of the estate. (*Ex parte Casey*, 71 Cal. 269, 12 Pac. 118.) The order cannot finally adjudicate any right. The utmost effect such an order could have in any case would be to fix the rule of evidence to be observed in an action brought to establish the right asserted in behalf of the estate. From this point of view it is not a final judgment, within the meaning of section 6710 of the Revised Codes, from which an appeal lies under subdivision 1 of section 7098. It is a mere order of judgment in a probate proceeding. As was pointed out in *Estate of Tuohy*, 23 Mont. 305, 58 Pac. 722, the expression "final judgment," as used in this subdivision, refers only to those judgments known at common law as final judgments as defined in section 6710, and does not include statutory determinations termed "orders" or "judgments" in probate proceedings. (See, also, *In re Kelly's Estate*, 31 Mont. 356, 78 Pac. 579, 79 Pac. 244.) The appeal, therefore, does not lie under subdivision 1 of that section, providing for an appeal from a final judgment. Subdivision 3 of this section provides for appeals from orders and judgments in probate proceedings, and enumerates all those from which appeals lie. Among these we find no mention of an order made in the proceedings under consideration. Hence the appeal does not lie at all, and is therefore dismissed. *Dismissed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

GREAT FALLS & TETON COUNTY RY. CO., APPELLANT, v.
GANONG ET AL., RESPONDENTS.

(No. 3,330.)

(Submitted September 15, 1913. Decided October 6, 1913.)

[136 Pac. 391.]

*Railroads—Eminent Domain—Right of Way—Extent of Right
—Competing Lines—Priority of Right—Evidence—Insuffi-
ciency.*

Railroads—Eminent Domain—Selection of Land—Improper Method.

1. Mere mental selection of a particular tract of ground by the officers of a railroad company is not of itself sufficient to give it a preference right to acquire the ground by condemnation, as against the rights of a competing company.

Same—Right of Way—Limit of Right—Statutes.

2. The extent of the right acquired by a railroad company under subdivision 4, section 4275, Revised Codes, which limits the quantity of land such a corporation may condemn for right of way purposes to "100 feet on each side of its center line," is confined to its necessities; in the absence of any need for the full amount thus prescribed, it cannot take it either as against the will of the owner or the requirements of a competing line.

Same—Right of Way—Extent of Right—Waiver.

3. The privilege extended to a railroad corporation by subdivision 4 of section 4275, Revised Codes, of taking a strip of land of the full width of 200 feet for right of way purposes, as distinguished from other purposes provided for in subdivisions 3 and 7, may be and is waived by taking a less amount.

Same—Right of Way—Evidence of Selection—Insufficiency.

4. A railroad company, in projecting a route through a town, had staked a line through the center of one of its streets 80 feet wide, caused it to be mapped, and subsequently approved by its executive officer. In an action by a rival company looking to the condemnation of a strip of land 60 feet wide immediately adjoining one side of the street, evidence *held* insufficient to sustain a finding that such strip had already been appropriated by the first company for a public use of equal necessity, viz., for right of way purposes, under subdivision 4 of section 4275, Revised Codes.

'Appeal from District Court, Teton County; J. B. Leslie, Judge.

Proceedings in eminent domain by the Great Falls & Teton County Railway Company against E. H. Ganong and others. From an order in defendants' favor, plaintiff appeals. Reversed and remanded.

Messrs. Veazey & Veazey and *Mr. Phil. I. Cole*, for Appellant, submitted a brief; *Mr. I. Parker Veazey, Jr.*, argued the cause orally.

We contend that, under the law and the authorities, a line is not definitely located or established, and no priority can possibly be obtained until the board of directors of the corporation has finally adopted and established the center line of the railway. Before property can be stamped with a public use or appropriated to public uses, the corporation, as distinguished from its engineers or other agents, must have acted. Engineers acting on behalf of the company have not the power to determine whether the power of eminent domain, vested in the corporation, should be exercised, or the power to appropriate property to the public uses of the corporation. It is only the author of the enterprise—not the subordinates—that must determine what land shall be taken. In the case of a corporation this can be done only by the board of directors.

“The making of a preliminary survey by an engineer of a railroad company, never reported to the company or acted upon, will not prevent another company locating the same line.” (Lewis on Eminent Domain, 3d ed., p. 905.) This principle runs through all of the authorities; and even in a state where the “stake theory” seems to be sustained, the fact of the prior adoption of the center line by the board of directors is always emphasized as one of the facts without which there cannot be a location. (*Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641, 50 S. E. 890; *Williamsport etc. R. Co. v. Philadelphia etc. R. Co.*, 141 Pa. 407, 12 L. R. A. 220, 21 Atl. 645; *Toledo Traction Co. v. Indiana etc. Ry. Co.*, 171 Ind. 213, 86 N. E. 54; *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 10 L. R. A. (n. s.) 909, 56 S. E. 624; *Johnston v. Callery*, 184 Pa. 146, 39 Atl. 73; *Kaufman v. Pittsburg etc. R. Co.*, 210 Pa. 440, 60 Atl. 2; *Central Mills Co. v. New York etc. R. Co.*, 127 Mass. 537.) The Puget Sound Company, however, contends that its board has acted and delegated to the assistant to its president authority to locate the center line. But directors, unlike stockholders,

cannot act by proxy and they cannot delegate their powers. Such an important corporate function as the definite location of the center line of a railway cannot be delegated by the board, but is an act which must be performed by the board itself. (*Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615.)

In Montana, no priority can be gained unless the tentative designation of the route, by survey or otherwise, and the adoption thereof by the corporation, is followed by a condemnation suit or a legal or equitable purchase placed on the records. Mr. Lewis draws this conclusion as to the situation in Montana: "In cases where no location or survey is necessary, and where the statute does not require any map, survey or description to be recorded, that person will have priority of right to appropriate, particularly property, who first institutes proceedings to condemn it, or secures a contract therefor." In support of this proposition see the following cases: *White River R. Co. v. Batesville etc. Tel. Co.*, 81 Ark. 195, 98 S. W. 721; *Lake Merced Water Co. v. Cowles*, 31 Cal. 214; *Minneapolis etc. R. Co. v. Chicago, M. & St. P. R. Co.*, 116 Iowa, 681, 88 N. W. 1082; *Atlanta, K. & N. R. Co. v. Southern R. Co.*, 131 Fed. 657, 66 C. C. A. 601; *Southern Indiana Ry. Co. v. Indianapolis etc. R. Co.*, 168 Ind. 360, 13 L. R. A. (n. s.) 197, 81 N. E. 65; *Barre R. Co. v. Montpelier & W. R. R. Co.*, 61 Vt. 1, 15 Am. St. Rep. 877, 4 L. R. A. 785, 17 Atl. 923; *Toledo Traction Co. v. Indiana etc. Ry. Co.*, 171 Ind. 213, 86 N. E. 54; *Rochester etc. R. Co. v. New York etc. R. Co.*, 110 N. Y. 128, 17 N. E. 680.

Messrs. Cooper & Stephenson and *Mr. H. H. Field*, for Respondents, submitted a brief; *Mr. Samuel Stephenson* argued the cause orally.

Under section 7335, subdivisions 1 and 2, and sections 4275 and 7349, Revised Codes, it was manifestly the intention of the legislature of this state to permit railroad corporations to take possession of real estate for the purpose of locating its line of railway without the necessity of condemning the property and of course to continue in possession thereof for such time as

would be necessary to enable it to commence the actual construction of its line, and it only becomes necessary to condemn and to pay the award when it is ready to do something other than the work necessary in order to make its location. It must therefore follow that where a railroad corporation has made a location of its line and placed the stakes upon the ground, and mapped out its station grounds, that it has appropriated its right of way and has possession of the same, together with its necessary grounds, just as effectually as if it had actually acquired its right of way by purchase or otherwise. And for this reason we contend that the lands involved in this condemnation proceeding were already appropriated to a public use by the Chicago, Milwaukee and Puget Sound Railway Company when this proceeding was instituted.

The Chicago, Milwaukee and Puget Sound Railway Company, as shown by the evidence, did not build its line into the state of Montana. It purchased a line of railway in the state of Montana that was already constructed. It thereafter filed a copy of its articles of incorporation with the secretary of state, and we contend that, under the provisions of sections 4271, 4291 and 4299, Revised Codes, it had a right to construct such branch lines in the state of Montana as it saw fit, without the necessity of filing any resolution or taking any other action. In support of this proposition we cite the following authorities: *Western Pennsylvania R. Co.'s Appeal*, 99 Pa. 155; *Mayor of Pittsburg v. Pennsylvania R. Co.*, 48 Pa. 355; *Tyler v. Elizabethtown & Paducah R. Co.*, 9 Bush (Ky.), 510; *Atlantic etc. R. R. Co. v. St. Louis*, 66 Mo. 228; *Pittsburgh etc. Ry. Co. v. Pittsburgh etc. R. Co.*, 159 Pa. 331, 28 Atl. 155; *Rudolph v. Pennsylvania etc. R. R.*, 166 Pa. 430, 31 Atl. 131; *Blanton v. Richmond etc. R. R. Co.*, 86 Va. 618, 10 S. E. 925; *Wheeling Bridge etc. Ry. Co. v. Camden Con. Oil Co.*, 35 W. Va. 205, 13 S. E. 369; *Howard County v. Boonville Central Nat. Bank*, 108 U. S. 314, 27 L. Ed. 738, 2 Sup. Ct. Rep. 689; *McAboy's Appeal*, 107 Pa. 548.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an appeal from certain findings and an order made in a proceeding in eminent domain, instituted by the Great Falls & Teton County Railway Company against E. H. Ganong and others, to condemn certain lands for railway purposes. The facts disclosed by the record are: That in 1910 the Chicago, Milwaukee and Puget Sound Railway Company, which had by construction and purchase secured a main line of road from Mobridge, South Dakota, to Seattle and Tacoma, in Washington, duly authorized the construction of a branch line from its main line at Saugus, Custer county, through the cities of Lewistown and Great Falls, the town of Chouteau, and on to the Canadian boundary. In August, 1912, the engineers of that company, acting under Charles A. Goodnow, assistant to the president, made a survey of the line and particularly that portion which passes through the town of Chouteau; staked out the center line through the center of Grove street in the town of Chouteau; made a map of the proposed route, which was submitted to Mr. Goodnow and by him approved on August 29, 1912, at which time he also selected a strip of ground 400 feet wide and 2,600 feet long, lying immediately east of and adjoining Grove street, for depot grounds, yards and other railway purposes. Thereafter options were taken for some of the lands wanted, and on September 6 the county commissioners of Teton county granted to the Puget Sound company a perpetual franchise for the use of Grove street for railway purposes (Chouteau being unincorporated) upon certain conditions mentioned in the resolution evidencing the grant, one of which conditions was that the company should by writing, filed with the county clerk within 30 days, indicate its acceptance of the grant upon the terms imposed. On September 12, 1912, the Great Falls & Teton County Railway Company received its charter as a Montana corporation, and on the same day, at a meeting attended by all the stockholders, the three persons named as incorporators were elected directors of the company, and, the directors having quali-

sed, a meeting was held at which a line theretofore surveyed by engineers employed by the promoters and incorporators was adopted as the line of definite location of the road to be constructed, and authority was given to institute proceedings in eminent domain to obtain lands for right of way, depot grounds, and other railway purposes. On the same day this proceeding was instituted by the filing of the complaint and the issuance of summons. In so far as involved here, the line of definite location of the Great Falls company runs parallel with the east boundary line of Grove street in the town of Chouteau, and the lands sought to be acquired in this proceeding constitute a plot of ground, in general terms, 300 feet wide and about 2,000 feet long, lying immediately east of and adjoining Grove street and included within the plot of ground selected by Mr. Goodnow for station grounds, yards, etc. The Puget Sound company appeared by answer and set forth that it had acquired the interests in the lands sought to be condemned theretofore owned by certain of the defendants named; and further alleged that it had taken the steps set forth above looking to the location and construction of its branch road from Saugus to the Canadian line. The trial court found, among other things, that all the lands sought to be condemned are necessary for the use of the Great Falls company, but that a strip thereof 60 feet wide, lying immediately east of and adjoining Grove street (hereinafter called the disputed strip), had theretofore been appropriated by the Puget Sound company for a public use of equal necessity. The order made by the court for commissioners to assess the damages includes all the land desired by the Great Falls company except the disputed strip mentioned, and as to that strip the

the court sustained the complaint and refused to include it in the damages. The Great Falls company appealed from the order and the court affirmed the same. The court found that the disputed strip was appropriated by the Puget Sound company, and in its consideration the contention that the evidence was insufficient to support the findings or conclusion, so far as the disputed strip is concerned.

Upon this appeal we are not concerned with any question which might arise between a railroad company and the private owner of land sought for railroad purposes. Our concern is only with the question of the priority of right to acquire property for railroad purposes as between competing railroad companies themselves. In authorizing the Great Falls company to condemn the land described in the order, the court impliedly found that the Puget Sound company had not appropriated any ground for station purposes, yards, or terminal facilities, and of this conclusion complaint cannot well be made. So far as the land sought for those distinct purposes is concerned, nothing was done except that Mr. Goodnow selected it. Whatever rule may be adopted for determining the priority as between rival roads seeking the same property for railroad purposes when neither company has attached itself to the property by contract or condemnation proceedings, we think that no authority has ever gone to the [1] extent of holding that the mere mental process of selecting a particular tract of ground wanted for railroad purposes is sufficient to give that company, whose authorized representative may conceal his selection in his own mind, a preference right to acquire the ground. But the trial court did find that, as to the disputed strip, an appropriation thereof had been made by the Puget Sound company "in order to lay out its road, and the laying out of its road is the public purpose to which said property had already been appropriated."

It will be observed that in this the trial court has followed the language of subdivision 4 of section 4275, Revised Codes. That section is entitled: "Powers of a Railroad Corporation." The introductory clause is: "Every railroad corporation has power." Then follow eleven subdivisions enumerating those powers. Subdivision 4 reads as follows: "To lay out its road, not exceeding in width one hundred feet on each side of its center line, unless a greater width be required for the purpose of excavation or embankment, and to construct and maintain the same, with a single or double track, and with such appendages

and adjuncts as may be necessary for the convenient use of the same."

In view of the language employed by the court above, and the facts that Grove street is 80 feet wide, that the center line of the Puget Sound company is in the center of that street, and that this strip 60 feet wide is necessary to give the Puget Sound company 100 feet on the east side of its center line, it seems reasonably clear that it was the theory of the trial court that by making a survey of its center line, staking and mapping the same, and causing the survey to be approved, all prior to the commencement of this condemnation proceeding, the Puget Sound company thereby acquired a preference right, as against its rival, to secure land over which to lay out its road, by virtue of subdivision 4 of section 4275 above, and that the acts which gave rise to such preference right effected an appropriation, to a public use, of a strip of ground 200 feet wide—100 feet on each side of the center line.

For the purposes of this appeal we may assume, without deciding, that in every contest between rival railroads, each seeking the same land for railroad purposes but neither having acquired an interest in it, the question of priority of right is to be determined by the equities of the particular case, and that in the instant case the acts enumerated above are sufficient, in effect, to give the Puget Sound company a preference right. We then approach the important question presented by this appeal, [2] *viz.*: What is the extent of the right acquired under subdivision 4 of section 4275 above, by the company which has the superior equities? While that subdivision contains a grant of power to lay out a roadway or right of way and to construct and maintain a single or double track thereon, it does not assume to grant such right of way or roadway. The language "not exceeding in width one hundred feet on each side of its center line" is not a grant but a limitation. In the absence of any necessity for additional grounds for excavation or embankment, the strip 200 feet wide simply marks the utmost limits of the

extent of land which a railroad company may take *in invitum* for roadway or right of way purposes. But no obligation is imposed upon any company to take the full amount permitted, and in the absence of any necessity it cannot do so, either as against the will of the owner or the necessities of a competing road. The strip 200 feet wide is the utmost that it can take, but it may be content with any quantity less which is justified by its reasonable necessities. The line of stakes through the center of Grove street—the only outward, visible evidence of the center line of the Puget Sound company's right of way—gave no indication of the extent of the land which that company desired or needed. But if we adopt the theory of those courts which indulge the presumption in such a case that the full amount allowed by law was intended to be claimed, we are still unable to agree with the conclusion of the trial court. So far [3] as the extent of the right of way is concerned, subdivision 4, above, at most extends to a railroad company the privilege of taking a strip 200 feet wide, if necessary. The privilege may be accepted or it may be waived; and it is waived by taking a less amount. (*Joplin & W. Ry. Co. v. Kansas City, Ft. Scott & M. R. Co.*, 135 Mo. 549, 37 S. W. 540.) If the Puget Sound company's preference right to acquire this disputed strip cannot be justified under subdivision 4 above, it cannot be justified at all. It was not in possession of that company; its exterior boundaries were not staked or even surveyed, so far as this record discloses. The right attaches, if at all, by virtue of surveying, staking, mapping and adopting the line through the center of Grove street; and the trial court must have found that it was by virtue of these acts that the Puget Sound company had availed itself of the privileges and powers granted by subdivision 4 above. No other reasonable construction can be given the trial court's findings. That subdivision 4 deals exclusively with land sought for right of way purposes, as distinguished from land needed for yards, depot grounds, terminal, and other railroad facilities, is apparent. That it was not the intention of the legislature to limit

a railroad company to a strip 200 feet wide for all railroad purposes is clearly indicated by the language employed. Subdivisions 3 and 7 of the same section provide for acquiring lands for other railroad purposes.

Our inquiry, then, must be limited to the extent of the preference right which the Puget Sound company acquired to secure [4] land under subdivision 4 above for a right of way. In the first place, that company was not claiming a strip of ground 100 feet on each side of its center line. Beyond the west line of Grove street it was not claiming anything at all except one-half of blocks 4 and 11, and that was claimed only for the purpose of locating a passenger station. It secured a franchise for the use of all of Grove street if it chose to accept the conditions imposed by the county commissioners. But, furthermore, as if to set at rest the question as to the purpose for which all of the land lying east of Grove street, including this disputed strip, was wanted, Mr. Goodnow, who made the selections and who was the only person who assumed to represent or to speak for the Puget Sound company, testified that on August 29, 1912, when the map of the survey was brought to him, he then selected the station grounds desired by his company—a plot of ground 400 feet wide and 2,600 feet long, lying immediately east of and adjoining Grove street and including the strip, 60 feet wide, now in dispute. Continuing, the witness said: "On the west side of Grove street I selected half of block 11 and a portion of the lots immediately north of that in block 4; that is to say, the east half of block 4. * * * That selection was made for the purpose of locating the passenger station. * * * The ground to the east of Grove street was selected for the ordinary purposes of station grounds. I selected 400 feet in width, because it would be necessary to straighten out Spring creek and because I thought it would take some room from the station grounds in order to do that, probably 50 or 75 feet. We expect, of course, to locate elevators and industries of that character on this ground. * * * The west side of Grove street simply accom-

modates the passenger business. • • • We would propose to hold the land on the east side of Grove street entirely for industrial and passing tracks, *etc.*” To our minds this seems conclusive that the Puget Sound company was not claiming any ground east or west of Grove street for right of way purposes, but was content to use the street, 80 feet in width, for right of way. Counsel for that company drafted the franchise granting the use of that street, and the intention of his company is indicated, in a measure at least, by Article 1, which reads as follows: “Article 1. That there be, and there is hereby granted, unto the Chicago, Milwaukee & Puget Sound Railway Company, • • • the perpetual right to use that certain street known as Grove street in the town of Chouteau, and the additions thereto, for the purpose of laying down and maintaining thereon a railway track or tracks, together with the necessary switches, turnouts and sidetracks, and to operate a line of cars over and along the same for the purpose of conveying passengers, freight, express and mail matter, and carrying on such other business as is ordinarily carried on by a railway company.” It cannot be claimed that any part of the strip 400 feet wide east of Grove street was wanted for right of way. The entire strip was selected for other purposes, and purposes recognized by the statute as altogether distinct from the right of way.

Under the most favorable view which can be adopted, the evidence fails to sustain the finding that the strip of ground 60 feet wide lying immediately east of and adjoining Grove street was appropriated for any public use at the time this proceeding in condemnation was instituted. There is not any evidence that the board of directors of the Puget Sound company ever authorized Mr. Goodnow to adopt a line of definite location of its road, even assuming that so important a corporate act can be delegated. Neither is there any evidence of authority conferred upon the president of that company by the statutes of its parent state or the by-laws of the corporation. There is little, if anything, more than a bare scintilla of evidence that Mr. Goodnow

acted by virtue of a common custom. There is not any evidence that the franchise granted by the county commissioners for the use of Grove street was ever accepted.

The order of the trial court is reversed and the proceeding is remanded, with directions to eliminate the finding that the disputed strip was appropriated for a public use by the Puget Sound company, and to modify the order for commissioners, so as to include such strip.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied November 13, 1913.

GREAT FALLS & TETON COUNTY RY. CO., RESPONDENT,
v. E. H. GANONG ET AL., APPELLANTS.

(No. 3,335.)

(Submitted September 15, 1913. Decided October 6, 1913.)

[136 Pac. 390.]

Corporations—Board of Directors—Quorum—Validity of Corporate Acts—Officers—Vacancy—Effect of.

Officers—When Deemed Vacant.

1. An existing office without any incumbent is vacant, whether it be a new one or an old one.

Same.

2. An office newly created becomes *ipso facto* vacant in its creation.

Corporations—Board of Directors—Vacancy—Quorum—Validity of Corporate Acts.

3. Where only three out of five directors provided for in the articles of incorporation as the number constituting the board of directors of a railroad corporation had been selected by the stockholders, the corporate acts of the three, constituting, as they did, a quorum, were valid, as against an attack by one outside the corporation or by the state, so long as they acted either unanimously or by a majority of such quorum.

Appeal from District Court, Teton County; J. B. Leslie, Judge.

CONDEMNATION PROCEEDINGS by the Great Falls & Teton County Railway Company against E. H. Ganong and others. From certain findings and an order made to condemn land for railroad purposes, defendants appeal. Affirmed.

Messrs. Cooper & Stephenson and *Mr. H. H. Field* submitted a brief in behalf of Appellants; *Mr. Samuel Stephenson* argued the cause orally.

In behalf of Respondent, *Messrs. Veazey & Veazey* and *Mr. Phil. I. Cole* submitted a brief; *Mr. I. Parker Veazey, Jr.*, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an appeal by the Chicago, Milwaukee and Puget Sound Railway Company and others from certain findings and an order of the district court made in a condemnation proceeding instituted by the Great Falls and Teton County Railway Company against E. H. Ganong and others, to condemn certain lands near the town of Chouteau for railway purposes. The appellants are the owners of the property sought to be condemned, and by this appeal they raise the question of the right of the Great Falls company to exercise the power of eminent domain. The record discloses that, upon the receipt of the charter of the Great Falls company as a Montana corporation, the stockholders selected three persons directors, and that these three directors qualified and organized as a board and constituted the only board of directors of the company at the time these proceedings were before the trial court. The articles of incorporation provide for a board of directors of five members, and section 4274, Revised Codes, fixes five as the minimum number of directors of a railroad corporation. It is urged upon us that, "where a minimum number of directors is fixed by statute or the company's regulations, the provision is mandatory, so that if the total number falls below such minimum

no valid board meeting can be held although the prescribed quorum may attend''; and 2 Machen's Modern Law of Corporations, section 1456, is cited as authority for the rule which appellants invoke. The author of the article quoted refers to but a single case to support his text. (*Bottomley's Case*, 16 Ch. Div. 681.) The decision in that case is reviewed at length by the supreme court of California, in *Porter v. Lassen County Land etc. Co.*, 127 Cal. 261, 59 Pac. 563, and reference is had to the peculiarly worded English statute which influenced the decision in *Bottomley's Case*. The California court reaches the conclusion—and we think correctly—that there is not anything in the decision of the English case which militates against the general rule that a quorum of a duly constituted board may bind a corporation as the board with all its members present and acting in unison might do, and that vacancies on the board do not prevent the remaining directors—if they constitute a quorum—from holding lawful meetings and transacting the company's business.

By the organization of the Great Falls company five offices were created; three of these were filled and the other two simply remained vacant. "An existing office without any incumbent [1] is vacant, whether it be a new one or an old one." (*State ex rel. Buckner v. City of Butte*, 41 Mont. 377, 109 Pac. 710; Mechem's Public Offices and Officers, sec. 131; Throop on Public Officers, sec. 431.) "An office newly created becomes *ipso facto* [2] vacant in its creation." (*State ex rel. Smith v. Askew*, 48 Ark. 82, 2 S. W. 349; *In re Fourth Judicial Dist.*, 4 Wyo. 133, 32 Pac. 850.) Section 3836, Revised Codes, provides for the organization of the board of directors of every [3] domestic corporation—including railroad corporations—and then proceeds: "A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act." If, then, a majority of the directors is sufficient to form a board,

and such board can perform all corporate acts, vacancies cannot affect the legality of its proceedings so long as the legally constituted quorum is present and acting either unanimously or by a majority of such quorum. (*Porter v. Lassen County Land etc. Co.*, above.) The failure of the stockholders of this corporation to fill all the offices by electing five directors does not invalidate the title of the three who were selected or prevent them from legally representing the corporation so long as they constitute a quorum. (*Wright v. Commonwealth*, 109 Pa. 561, 1 Atl. 794; *In re Union Ins. Co.*, 22 Wend. (N. Y.) 591; *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929.) This attack is from outside the corporation, and presents a different question from the one which would arise if a minority stockholder or the state was complaining that the stockholders of this company had not discharged fully their duty and elected all the directors required by the articles of incorporation and the statutes of this state. In the present controversy, as between this corporation and a person from outside the corporation itself, the trial court properly held that the Great Falls and Teton County Railway Company was authorized to exercise the power of eminent domain. So far as the trial court's findings and order are involved in this appeal, they are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

LEVERIDGE ET AL., APPELLANTS, v. HENNESSY ET AL.,
RESPONDENTS.

(No. 3,244.)

(Submitted September 16, 1913. Decided October 6, 1913.)

[135 Pac. 906.]

Mining Claims—Declaratory Statement—Misleading Description—Void Location—New Trial—Discretion.

New Trial—Order—Discretion—Review.

1. *Quære*: Must the ruling of a district judge, called in to pass upon a motion for new trial, be tested by the same standards of discretion as would be applied to that of the judge who tried the case if he had ruled thereon?

Mining Claims—Declaratory Statement—Descriptions—Degree of Accuracy Required.

2. Though it was not necessary that a declaratory statement of a quartz lode location made under amended section 3612, Political Code of 1895 (Laws 1901, p. 141), contain a description of the claim by metes and bounds, or that the statements therein be made with mathematical precision as to measurements or technical accuracy of expression, the locator was required to so describe the claim that the boundaries could be readily traced, and that a person of reasonable intelligence could, by aid of the directions when taken with the markings upon the ground, find the claim and run its lines; hence where the description is so erroneous as to be delusive and misleading, as when the declaratory statement and the markings do not even approximately agree as to the general shape of the claim or as to any point, direction or distance, the location is void.

[As to discovery of minerals in mining claims and rights of locators prior thereto, see note in 139 Am. St. Rep. 154.]

Same—Misleading Description—When Location Void.

3. *Held*, under the rule declared in paragraph 2, *supra*, that where the descriptions found in a declaratory statement, though suggesting a rectangle lying north and south, were such that one taking them and proceeding from the northern corners according to the directions given, would miss one of the southern corners by over 500 and the other by over 800 feet, and find the south line not only over 100 feet farther from the point of discovery but also some 432 feet shorter than called for in the statement, the location was void.

New Trial Order—Discretion.

4. Where the conclusion of the trial court in an action to quiet title to a portion of a mining claim in apparent conflict with another location was supported by the decisive preponderance of the evidence, there was not any room for discretion in the district judge called in to determine a motion for new trial, and the granting of the motion was therefore error.

Appeal from District Court, Granite County; J. Miller Smith, a Judge of the First Judicial District, presiding.

ACTION by R. S. Leveridge and another against Tom Hennessy and another. From an order granting a new trial, plaintiffs appeal. Reversed.

Mr. D. M. Durfee and *Mr. W. E. Moore*, for Appellants, submitted a brief and argued the cause orally.

Mr. William Meyer, for Respondents, submitted a brief and made oral argument.

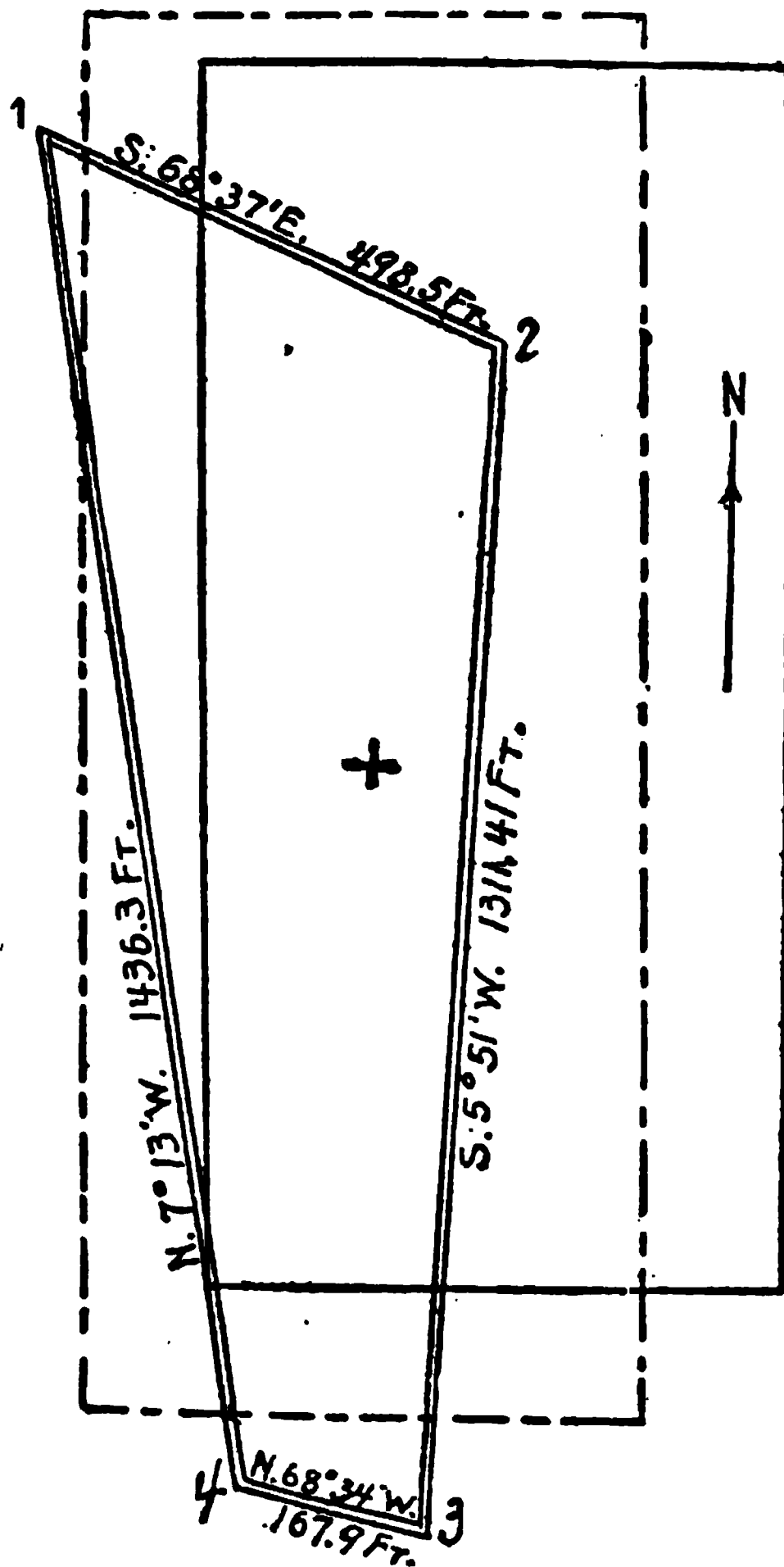
MR. JUSTICE SANNER delivered the opinion of the court.

Action by appellants to quiet title to a portion of the East Brooklyn lode, Granite county, Montana, which is in apparent conflict with a prior location of the Speculator lode, claimed by respondents. The trial was to the court, Honorable Geo. B. Winston presiding without a jury, and he made findings of fact and conclusions of law in favor of appellants. Thereafter respondents, having filed their notice of intention to move for a new trial and having caused their bill of exceptions to be signed and settled by Judge Winston, filed an affidavit disqualifying him from further proceeding with the motion. Thereupon the Honorable J. Miller Smith, of the first judicial district, was called in to hear and determine the motion, and the same, having been submitted to him, was granted. From the order granting respondents' motion for new trial, this appeal is taken.

Much space is given in the briefs to a discussion of the question [1] whether the ruling of a judge called in to pass upon a motion for a new trial is to be tested by exactly the same standards of discretion as would be applied to that of the judge who tried the case if he had ruled thereon. The question is an interesting one and unsettled in this state; but we do not deem the present case an opportune one for its consideration for reasons which will presently appear.

The contention of appellants is: (1) That the markings of the Speculator as now claimed by the respondents are not the same as originally made upon the ground, and therefore the

respondents abandoned their claim; and (2) if the markings of the Speculator as now claimed by the respondents are the original markings upon the ground, then the location was void *ab initio* because of a substantial departure from the calls of the declaratory statement. The subjoined drawing will illustrate the situation; the + representing the point of discovery; the double line representing the Speculator as now claimed by the



respondents; the single line representing the Speculator as originally marked upon the ground, according to appellants;

and the broken line representing the claim as it would appear if in literal conformity to the calls of the declaratory statement.

As to whether the Speculator was ever marked upon the ground in the manner asserted by appellants (shown by the single line), there is a sharp conflict in the evidence, but no good purpose would be served by reciting the testimony at length, for the reason that the trial court did not specifically find upon the subject. The finding, so far as it touched upon the asserted claims of respondents, is that they "never have been and are not now the owners of the alleged Speculator quartz lode mining claim * * * and are not and have not been at any time the owners of the area in conflict between the said East Brooklyn quartz lode mining claim and the said alleged Speculator quartz lode mining claim." As we read this finding, it proceeds upon the theory that the location of the Speculator was void and is inconsistent with a valid claim subsequently lost by abandonment.

Whether the location of the Speculator was void must be determined by the only criterion upon which it is assailed, *viz.*, a fatal divergence between the declaratory statement as filed and the markings of the claim upon the ground. The statute in force when the Speculator location was made (section 3612, [2] Pol. Code 1895, as amended by Laws 1901, p. 141) did not require, as it did before and has since, that the declaratory statement contain a description of the corners with the markings thereon, but it was required of the locator that, within thirty days after posting his preliminary notice of location, he "define the boundaries of his claim by marking a tree or rock in place or by setting a post or stone at each corner or angle of the claim," and that, within sixty days after posting his preliminary notice of location, he file a declaratory statement containing, among other things, "the number of feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein," and "such description of the location of said claim with reference to some natural object or permanent monu-

ment as will identify the claim." Such a statute, it is true, does not require that the declaratory statement contain a description by metes and bounds (*Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728; *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654), but it does require that, taking the discovery as the initial point, the boundaries be so definite and certain as that they can be readily traced (*Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714), and that the declaratory statement contain directions which, taken with the markings, will enable a person of reasonable intelligence to find the claim and run its lines (1 Lindley on Mines, sec. 381; *Gamer v. Glenn*, *supra*; *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869). While neither mathematical precision as to measurements nor technical accuracy of expression is expected, the degree of accuracy that is required is indicated by the fact that the locator after his discovery had thirty days in which to definitely ascertain the course of the vein and mark his boundaries and thirty days more in which to file his declaratory statement describing his claim so that it could be identified. (*Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037.) That degree of accuracy is not met if the description given is so erroneous as to be delusive and misleading, as when the declaratory statement and the markings upon the ground do not even approximately agree as to the general shape of the claim or as to any point, direction, or distance. (*Dillon v. Bayliss*, 11 Mont. 171, 27 Pac. 725.)

Recurring, then, to the declaratory statement of the Speculator, we observe that it calls for a tract of ground 1,500x600 [3] feet, "800 feet in a northerly direction and 700 feet in a southerly direction along the course of the said lode (which is given as northerly and southerly) from the point of discovery and 300 feet on each side, * * * " the exterior boundaries of which "are distinctly marked by posts or monuments at each corner, * * * namely: Beginning at the northwest corner No. 1, * * * thence easterly 600 feet to the northeast corner No. 2, * * * thence southerly 1,500 feet to the southeast corner No. 3, * * * thence westerly 600

feet to the southwest corner No. 4, * * * thence northerly 1,500 feet to the place of beginning.” As it is now claimed by respondents to have been always marked upon the ground, the Speculator is shaped as shown by the double line in the drawing above and comprehends a tract of ground 500 feet northerly, 800 feet southerly, 120 feet easterly, and 230 feet westerly from the point of discovery, bounded as follows: Commencing with the northwest corner and running thence south $68^{\circ} 37'$, east 498.5 feet to the northeast corner, thence south $5^{\circ} 51'$ west 1,311.41 feet to the southeast corner, thence north $68^{\circ} 34'$ west 167.9 feet to the southwest corner, thence north $7^{\circ} 13'$ west 1,436.3 feet to the place of beginning.

While the sufficiency of the description is essentially a question of fact for the jury or for the court sitting without a jury (*Bramlett v. Flick, supra*), and while no stress is or can be laid upon the mere departure of the lines from the cardinal directions, since the tract is northerly and southerly, yet the description given in the declaratory statement does suggest that the claim is a rectangle, and hence that one starting from the point of discovery and finding the northern corners might, by proceeding at right angles to the northern line, follow the other lines and pick up the other corners. As a matter of fact, if he did so proceed he would miss the southeast corner by over 500 feet and the southwest corner by over 800 feet. Furthermore, the record discloses that the southerly portion of the claim lies in timber through which the lines were not “swamped”; that the south line is over 100 feet farther from the point of discovery and over 432 feet shorter than called for; and that the claim as laid out in nowise resembles what the declaratory statement suggests. In view of all this it is a rational inference that some difficulty might be expected in any attempt to find the lines and corners with the aid of the declaratory statement, and the record shows that as a matter of fact difficulty was met, and doubt may be entertained as to whether it was wholly surmounted even with the aid of the locator who placed

the corners. No liberality of construction will avail to overcome such a condition.

Respondents place much reliance upon *Bramlett v. Flick*, *supra*, wherein a claim which departed somewhat as to directions and distances from those given in the declaratory statement was sustained. But the departures in that case were neither so many nor so great as are here presented. The directions in the Bramlett notice, if followed with reasonable intelligence, could not mislead, and the jury found as a matter of fact that they were sufficiently clear and definite. But no one, unless told, would suppose the Speculator as marked and the Speculator as described to be one and the same.

The conclusion of the trial court that the Speculator had never [4] any lawful existence is supported by the decisive preponderance of the evidence. In these circumstances there was no room for discretion in the judge who granted the motion; there was nothing for it to rest upon. The motion should have been denied, and the order granting it is reversed. *Reversed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
OCTOBER TERM, 1913.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,
THE HON. SYDNEY SANNER,

} **Associate Justices.**

O'HANLON, APPELLANT, v. RUBY GULCH MINING CO.,
RESPONDENT.

(No. 3,273.)

(Submitted September 18, 1913. Decided October 11, 1913.)

[135 Pac. 913.]

*Mining Claims—Cotenants—Annual Representation Work—
Failure to Contribute—Abandonment—Laches—Adverse
Claims—Quieting Title—Ouster—Remedies—Ejectment—
Theory of Case—Appeal—New Trial.*

New Trial—Order Granting—Affirmance, When.

1. An order granting a new trial, which does not indicate upon which of several grounds assigned it was based, will be affirmed if justifiable upon any one of them.

Mining Claims—Annual Representation Work—Default of Co-owner—Forfeiture—Notice—Administrators—Insufficiency.

2. Service of notice upon the administrator of the estate of one of several co-owners in an unpatented mining claim, to the effect that unless he should, within ninety days, pay his proportion of the amount expended by his co-owners in doing the annual representation work upon the claim, his interest would be declared forfeited under the provisions of section 2324, United States Revised Statutes, was insufficient, said section requiring service upon the then actual co-owner,—in this instance the heirs of the intestate, and not the administrator.

[As to discovery of mineral in mining claim and rights of locator prior thereto, see note in 139 Am. St. Rep. 154. As to the abandonment and forfeiture of mining claims, see note in 87 Am. St. Rep. 403.]

Same—Representation Work—Failure to Contribute Toward Payment of Expense—Statute of Forfeiture—Construction.

3. Section 2324, United States Revised Statutes, providing that the interest of one of several co-owners in a mining claim shall, upon due notice, become the property of his co-owners upon his failure to contribute his proportion of the expenditure incident to the doing of the annual representation work upon the claim, is one of forfeiture and must be strictly construed.

Same—Estoppel—Laches—Abandonment—Evidence—Admissibility.

4. While evidence that the heirs of a delinquent co-owner in an unpatented mining claim had been made aware of the fact that the administrator of the estate of their intestate had been served with notice calling for contribution toward the payment of the cost of the annual representation work on the claim, under penalty of forfeiting "his interest" therein, was immaterial (see paragraph 2, *supra*), it was both competent and material, under the circumstances of the case, as tending to show laches on their part in asserting their claims to the interest declared forfeited, as well as an abandonment thereof.

Same—Abandonment—Failure to Contribute to Cost of Representation Work.

5. Though one of several cotenants in a mining claim cannot by any course of conduct on his part abandon the claim so as to destroy the interests of his cotenants and cause it to revert to the government, he may abandon his own interest and should be held to have done so where, with knowledge that his cotenants have performed the annual representation work upon the claim and are developing it, he fails to contribute his proportion of the expense and shows by his conduct that he has renounced his right, reasserting it only after development has shown the claim to be valuable.

Trial—Theory of Case—Appeal.

6. Where defendant made no objection to the trial of a cause as one to quiet title to a mining claim under section 6870, Revised Codes, he will not be heard on appeal to insist that it should have been tried as an adverse suit under section 2326, United States Revised Statutes.

Mining Claims—Ouster of Cotenant—Remedies.

7. While a cotenant who has been excluded from a mining claim may bring an adverse suit to have his rights determined, so that the patent will convey directly to him whatever interest he may have, he is not bound to do so, but may wait until the patent proceedings are concluded, and then have the patentee declared a trustee for him to the extent of his interest.

[As to cotenancy in mines, see note in 91 Am. St. Rep. 851.]

Same—Quieting Title—Ejectment—When Proper Remedy.

8. The remedy of one claiming to have been wrongfully ousted from a mining claim then in possession of defendant, who asserts an adverse claim, is an action in ejectment and not one to quiet title under section 6870, Revised Codes, which confers power upon courts of equity to entertain actions in which the defendant is asserting an adverse claim while the plaintiff is in possession, and actions in which neither plaintiff nor defendant is in possession, and the latter is asserting the adverse claim.

Appeal from District Court, Choteau County; Jno. W. Tattan, Judge.

ACTION by Thomas J. O'Hanlon and another against the Ruby Gulch Mining Company. From an order granting a motion for new trial plaintiffs appeal. Affirmed.

Messrs. Cooper & Stephenson, for Appellant, submitted a brief; *Mr. Samuel Stephenson* argued the cause orally.

Before one cotenant can acquire the interest of his cotenant in a mining claim, he must either proceed strictly in accordance with the provisions of section 2324, United States Revised Statutes (5 Fed. Stats. Ann. 19, U. S. Comp. Stats. 1901, p. 1426), or he must hold the entire claim adversely for a period of ten years. The relation of co-owners in a mining claim is such that the doing of the annual representation work by one inures to the benefit of all. And since Carter did the representing each year down to the time when defendant bought Carter out, the title of plaintiffs to the O'Hanlon one-third interest was as good as Carter's title to the two-thirds interest. Mere lapse of time, short of the statute of limitations, does not constitute laches. There must be some act or omission of the party to whom laches is sought to be attributed which affects the other party so unfavorably as to render it inequitable to excuse the delay. What would be laches in one case might not constitute such in another. The question is one addressed to the sound discretion of the court, depending upon all of the facts of the particular case. (*The Queen of the Pacific*, 61 Fed. 213; *Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277.) Laches is defined as inexcusable delay in asserting a right. One who acts as soon as possible after learning of his right, or that his right has been invaded, cannot be charged with delay. (*Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833.) Under the Code of Procedure it is held that laches is an equitable defense, which, unless disclosed by the complaint, must be proved by the answer, and the mere appearance of the lapse of time is not sufficient to raise the issue. (*Gay v. Havermale*, 27 Wash. 390, 67 Pac. 804.)

In order to make a notice of forfeiture valid, it must be served upon the co-owners, and our contention is that the administrator of the estate was not a co-owner, but that the heirs of Thomas O'Hanlon, deceased, were the owners of whatever interest he had in said mining claim at the time of his death. (*Elder v. Horseshoe Min. etc. Co.*, 9 S. D. 636, 62 Am. St. Rep. 895, 70 N. W. 1060; *Billings v. Aspen Min. etc. Co.*, 51 Fed. 338, 2 C. C. A. 252.)

Messrs. H. G. & S. H. McIntire, for Respondent, submitted a brief; *Mr. H. G. McIntire* argued the cause orally.

Plaintiffs, as the heirs of Thomas O'Hanlon, deceased, had either actual or constructive knowledge of what property their father died seised of. Actual knowledge appears from the testimony, constructive knowledge from the record of the deeds to their father. It was therefore their duty to make inquiry as to the facts relating to their title, if any, and they are charged with notice of the facts which such inquiry would have elicited. This is peculiarly so in cases involving mining property. (*Johnston v. Standard Min. Co.*, 148 U. S. 360, 37 L. Ed. 480, 13 Sup. Ct. Rep. 585, 17 Morr. Min. Rep. 554; *Mantle v. Speculator Min. Co.*, 27 Mont. 473, 71 Pac. 665.) Such inquiry would have disclosed the claim to full ownership, first by Carter, and second by his grantee; that there was a hostile holding to and a repudiation of the former cotenancy; that those persons, respectively, were claiming the property solely, were in exclusive possession of the same, and were expending large sums of money in its development, of which they also had actual knowledge. In addition to this they knew, or should have known, had they made the inquiry, that this was an unpatented mining claim; that the federal statute requires \$100 per annum of improvements to be made on such a claim; that they had paid no portion of such sum, nor offered so to do. Further, on inquiry at the county clerk's office they would have ascertained that it was asserted this claim had been advertised out. As to the duty to inquire, see *Delmoe v. Long*, 35 Mont. 139,

88 Pac. 778; *Fuller v. Montague*, 59 Fed. 212, 8 C. C. A. 100; *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. Ed. 548, 14 Sup. Ct. Rep. 671; *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807; *Foster v. Mansfield etc. R. Co.*, 146 U. S. 88, 36 L. Ed. 899, 13 Sup. Ct. Rep. 28.

A person claiming an interest in property must be diligent in asserting his rights. "The law helps the vigilant before those who sleep on their rights." (Rev. Codes, sec. 6195.) Where a delay appears such as in this case, the party must show an excuse therefor, or it is conclusively presumed that none exists. (*Kavanaugh v. Flavin*, 35 Mont. 133, 88 Pac. 764; *Bell v. Hudson*, 73 Cal. 285, 2 Am. St. Rep. 791, 14 Pac. 791.) Where the rights of third parties might be affected by the delay, the complainant must make a satisfactory showing or excuse for the delay. (*McNeil v. McNeil*, 170 Fed. 289, 95 C. C. A. 485; *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299.) Failure to search the records for several years is laches. (*Redd v. Brun*, 157 Fed. 190, 84 C. C. A. 638.) The owner of lands, who knows that another is in possession improving the property under a deed or contract of sale, may not wait for the whole statutory period to eject the purchaser, regardless of the plaintiff's laches. (*Kessler v. Ensley Co.*, 123 Fed. 546.)

A party claiming an interest in a mining claim may lose the same by abandonment. "Being a question of intent it operates *instantly*." (27 Cyc. 596 *et seq.*) "Lapse of time is persuasive evidence of its existence." (Note 21.) "The statute of limitations has nothing to do with it." (Note 22.) "Nor does it involve an estoppel." (Note 23.) "It need not be specially pleaded, but may be shown under a general denial or general allegation of title." (Note 24.) "Abandonment may arise from a single or a series of acts continued through a long space of time. It is to be determined by all the circumstances of the case." (Note 25.) "The statement of a party that he did not intend to abandon the claim is not conclusive." (Note 35.) An undivided interest may be abandoned. (*Black v. Elkhorn Min. Co.*, 163 U. S. 445, 41 L. Ed. 221, 16 Sup. Ct. Rep.

1101, 18 Morr. Min. Rep. 375. See, also, *Trevaskis v. Peard*, 111 Cal. 599, 44 Pac. 246, 18 Morr. Min. Rep. 353; *Muse v. Arlington Hotel Co.*, 68 Fed. 637; *Harkrader v. Carroll*, 76 Fed. 474, 18 Morr. Min. Rep. 474.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On April 20, 1908, the defendant, claiming to be the exclusive owner of the Divide quartz lode mining claim, situate in the Little Rocky mining district, in Choteau county, made its application to the United States for a patent therefor through the land office at Glasgow. The plaintiffs, each claiming an undivided one-sixth interest therein as a tenant in common with the defendant, brought this action to have their rights established and determined as an adverse claim in pursuance of the requirements of the federal statute. (U. S. Rev. Stats., sec. 2326; 5 Fed. Stats. Ann. 35; U. S. Comp. Stats. 1901, p. 1430.) The pleadings were framed and the issues made up in accordance with this theory. At the trial, however, the plaintiffs omitted to introduce evidence showing that they had obtained a stay of the patent proceedings by filing their adverse claim in the land office, apparently having adopted the theory that, though the patent should issue to the defendant, it would be held trustee for the plaintiffs to the extent of their respective interests, and that the filing of the adverse claim and bringing timely action thereon was unnecessary. In any event, the trial proceeded as in an ordinary action to quiet title or to determine an adverse claim under section 6870 of the Revised Codes. The court found the issues in favor of the plaintiffs and entered a decree accordingly. Pending a motion for a new trial, Hon. Frank N. Utter, the judge *a quo*, was disqualified. He thereupon ordered that the action be transferred to the other department of the court over which Hon. John W. Tattan presides, who sustained the motion and ordered a new trial. The plaintiffs have appealed. The notice of intention assigns as grounds for the motion irregularities in the proceed-

ings, insufficiency of the evidence to justify the findings, and [1] errors in law occurring at the trial. The order does not indicate upon which of these grounds it was based; therefore, under the rule heretofore observed in such cases, it must be affirmed if it can be justified upon any one of the grounds assigned. (*Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89.)

The plaintiffs insist that the court abused its discretion in granting the order, for the reason that upon the facts as disclosed by the evidence the right to the interests claimed by them was clearly established, and that under the rules of law applicable the court could not have found and decreed otherwise than it did. Counsel for defendant insist that the motion was properly granted on any one of four different grounds, viz.: (1) That the court erred in excluding material evidence; (2) that it was incumbent upon the plaintiffs to prosecute the action as an adverse suit, in conformity with the provisions of the federal statute, at the peril of losing their rights; (3) that the evidence discloses conclusively that the plaintiffs were guilty of laches in asserting their claims; and (4) that the interests of plaintiffs were abandoned by them long prior to the bringing of this action. In making this statement of the contentions of counsel, we have for convenience deviated somewhat from the order pursued in the brief.

The facts disclosed by the evidence are in brief the following: The claim was located by Thomas Carter and William McKenzie on January 1, 1894. On October 24 in the same year each of them, by deed duly acknowledged and recorded, conveyed an undivided one-sixth interest to Thomas O'Hanlon, who resided in Choteau county, and was engaged in merchandising at Chinook. The conveyances were made pursuant to an agreement entered into prior to the location of the claim between O'Hanlon and Carter and McKenzie, to the effect that O'Hanlon was to furnish the latter supplies to enable them to locate and hold mining claims, and that they were to convey to him a one-third interest in any claims discovered and located by them. The claim, together with others which were located un-

der the agreement, was thereafter held by the three in common, Carter and McKenzie doing the representation work under the agreement until February 15, 1898, when Thomas O'Hanlon died intestate, leaving his two sons, Thomas J. and Henry, his only heirs. One L. V. Bogy was appointed administrator upon the estate, and continued to serve in that capacity until May 19, 1900, when he resigned. The plaintiff, Henry J. O'Hanlon, a brother of the decedent, was appointed in his stead and served until the estate was finally distributed. The two sons were minors at the time their father died, but attained their majority during the course of the administration, the former in 1899, and the latter early in 1901. Though Bogy knew of the interest of O'Hanlon in the Divide claim, he did not include it in the inventory, nor was it mentioned in the decree of distribution. On June 22, 1901, Henry O'Hanlon conveyed to Thomas J. O'Hanlon, by writing duly acknowledged and recorded, his entire interest in the estate, subject to the debts of the decedent, but without specific mention of the Divide claim. On February 1, 1902, by a similar writing, Thomas J. O'Hanlon conveyed an undivided one-half interest to Henry J. O'Hanlon. The residue of the estate was distributed to Thomas J. and Henry J., the plaintiffs herein. The claim was not mentioned in the decree. So far as the record shows, Henry O'Hanlon remained in Choteau county. Soon after the death of his father, Thomas J. O'Hanlon went to Boston, Massachusetts. He there enlisted in the United States army, and served in the Philippine Islands until his discharge in 1901, when he returned to Choteau county. On February 5, 1900, Carter and McKenzie served on Bogy a notice addressed to him as "administrator of Thomas O'Hanlon Estate," that they had done the annual representation work, amounting to \$100 for the year 1899, necessary to hold the claim in conformity with section 2324, United States Revised Statutes (5 Fed. Stats. Ann. 19, U. S. Comp. Stats. 1901, p. 1426), and that, unless he should pay his proportion of this amount within ninety days from that date, his interest as co-owner would be held forfeited. Bogy

paid no attention to the notice, and did not, nor did anyone else thereafter, pay any part of the expenses for that or any subsequent year, though Carter and McKenzie, and the defendant as their successor, had possession of the claim, and did the work for each year until the beginning of this action. In addition to the work of representation, Carter and McKenzie also did a large amount of development work during the years prior to 1905. During the year 1904 or 1905 the defendant, with a view to acquiring the claim, obtained a lease and bond from Carter and McKenzie. It went into possession, and did development work upon it costing, according to the estimate of some of the witnesses, more than \$40,000, uncovering deposits of valuable ores, with the result that on September 6, 1906, it determined to purchase, and did purchase, the claim at the price of \$25,000 in cash. The plaintiffs were fully aware of what was being done, and also that Carter and McKenzie, and the defendant as their successor, were claiming to be the exclusive owners under the forfeiture notice given to Bogy in 1900, yet neither protested, or objected, or made any claim of interest, the first assertion of their claim being made by the bringing of this action. During June or July, 1901, Thomas J. O'Hanlon visited Carter, who lived on or near the claim. He made inquiry concerning the interest of his father's estate, and was then told by Carter that the interest of the estate had been forfeited. He was given the notice which had been served on Bogy, and, having read it, returned it to Carter, saying, "That is all right." He had been informed as early as the winter of 1901 that Carter and McKenzie were claiming that the interest of his father had been forfeited. On another occasion, prior to the purchase by the defendant, he went to the claim, and endeavored to induce Carter to sign notes for an account found charged against Carter and McKenzie upon his father's books. This account was about \$800, and all but about \$270 of it had apparently been charged as the price of supplies furnished to Carter and McKenzie while they were prospecting for the joint benefit of themselves and the father, and keeping up the representation work

upon the claims located by them. Again, some time prior to the date at which defendant paid to Carter and McKenzie the purchase price for the claim, Henry J. O'Hanlon questioned B. D. Phillips, the president of the defendant, as to whether it would be possible for him to collect from or through the defendant the amount of the account claimed to be due from Carter and McKenzie. He did not then assert an interest in the claim. The defendant continued to develop and mine the claim, until application was made for patent. There is no material conflict in the evidence. It is true Thomas J. O'Hanlon stated that he had no recollection of reading the notice of forfeiture on the occasion of his visit to Carter in 1901; but he admitted that he had learned in the winter of that year of the claim of Carter and McKenzie that his father's interest had been forfeited, and that during the conversation with Carter the latter had asserted that the O'Hanlon interest had been forfeited.

1. When the defendant offered in evidence a copy of the [2] notice, it was rejected as immaterial. An offer to show by Bogy that, when he received the notice, he "notified" Thomas J. and Henry O'Hanlon both that it had been served on him, was also rejected. The theory of the court in excluding the notice was that, since it was addressed to the administrator alone, it was wholly insufficient, because an administrator is not, by virtue of his office, a co-owner with the cotenants of his decedent in a mining claim, within the meaning of the federal statute, *supra*, because the legal title to property belonging to the estate descends, not to the administrator, but directly to the heirs, subject only to a lien in favor of the administrator for the payment of debts. So far as the notice, with proof of service upon Bogy, was evidence of the forfeiture, the view of the trial court was correct. "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the district court, and to the possession of any administrator appointed by that court for the purposes of administration." (Rev. Codes, sec. 4819.) The administrator was not, therefore, by virtue of his office a co-owner with

Carter and McKenzie; hence the service of the notice upon him could not be deemed a service upon the actual co-owners.

The federal statute provides: "Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures." (U. S. Rev. Stats., sec. 2324; 5 Fed. Stats. Ann. 19; U. S. Comp. Stats. 1901, p. 1420.)

The purpose of the provision is to afford a speedy, convenient and effective method of taking from one cotenant his interest in the property and giving it to another without the intervention of courts or juries. (1 Lindley on Mines, sec. 646.) Therefore, when one cotenant asserts that he has divested his cotenant of his interest in the common property, the courts make examination of the circumstances under which the alleged divestiture has been brought about, and deny the claim, unless the [3] facts exist authorizing the invocation of the provision, and the personal or constructive notice prescribed has been given in strict conformity with its requirements. In *Turner v. Sawyer*, 150 U. S. 578, 37 L. Ed. 1189, 14 Sup. Ct. Rep. 192, the court held that the statute is one of forfeiture, and as such must be strictly construed; hence a notice given by one who was not at the time actually a co-owner, but vested only with an equity under a sheriff's certificate of sale, was not effective to work a forfeiture, though he had done the full amount of work necessary to preserve the claim. So, where the delinquency was not shown by the facts presented by the evidence (*Brundy v. Mayfield*, 15 Mont. 201, 38 Pac. 1067), or the required work for the particular year was excused by Act of Congress (*Royston v.*

Miller (C. C.), 76 Fed. 50), or the delinquent co-owner to whom the published notice was addressed was dead (*Billings v. Aspen M. & S. Co.*, 51 Fed. 338, 2 C. C. A. 252), it was held that the attempt to work a forfeiture was ineffective. In *Elder, Admr., v. Horseshoe Mining etc. Co.*, 9 S. D. 636, 62 Am. St. Rep. 895, 70 N. W. 1060, the published notice was addressed "to Rufus Wilsey, his heirs, administrators, and to all whom it may concern." Wilsey, the delinquent co-owner, was dead. There was no administrator, the one originally appointed having died. The court held that, since the address included all persons who could have had an interest in the property in controversy, it was sufficient. In the same case, on error to the supreme court of the United States (194 U. S. 248, 48 L. Ed. 960, 24 Sup. Ct. Rep. 643), in affirming the judgment, Mr. Justice Peckham said: "This statute provides a summary method for the purpose of insuring the proper contribution of co-owners among themselves in the working of the mine, and it provides a means by which a delinquent co-owner may be compelled to contribute his share under the penalty of losing his right and title in the property because of such failure. It was not necessary, in our judgment, that the notice should specifically name the heirs of the deceased owner. The Act does not require it. If the notice be such that the former owner is particularly named and identified thereby, and his heirs are notified by the publication, it is a sufficient notice to them for the purpose of making it necessary for them to comply with the terms of the statute within the time designated therein, by the payment of their share of the expenses of working the mine, or else to lose their right, title, and interest therein. * * * A general address to the heirs of the person named and the proper publication of the notice is sufficient. It did not become insufficient because, in addition to being addressed to them, it was also addressed to their intestate by name. An address to a deceased person did them no harm, so long as it was also addressed to them." It may be noted that both courts, while stating that the statute does not require the notice to be addressed to anyone, imply by the language used that it should

be so addressed as to include all persons interested as co-owners. It may be noted, also, that, while neither definitely decides the question whether notice to the administrator is sufficient, both impliedly hold that it is not.

The notice under consideration was addressed to Bogy alone as the co-owner. If, under the rule as stated in *Turner v. Sawyer, supra*, the notice must be given by a co-owner, by the same rule it must, in order to be effective, be served upon the real co-owner, whether the service be personal or constructive. As we have seen, Bogy had no interest, and hence the notice to him could not be effective, for, if the word "co-owner" is used in a restrictive sense when applied to the co-owner giving the notice, it must be used in the same sense when applied to the delinquent co-owner.

But counsel insist, that if they had been permitted to do so, [4] they would have shown that the notice served on Bogy was called to the attention of both the sons, and hence that it became as effective as if it had been addressed to them and personally served upon them. In support of this position, they cite *Evalina Gold Min. Co. v. Yosemite Gold M. & M. Co.*, 15 Cal. App. 714, 115 Pac. 946. In that case the facts were these: The Slap Jack mine was owned by six persons as tenants in common. Two of them failed to do any portion of the representation work for the year 1898. In December of the following year the four other cotenants, having done the work, gave personal notice to the delinquent in writing, demanding contribution in pursuance of the provisions of the statute. The latter, having at that time conveyed away their interests, immediately delivered the notice to their grantee under a prior unrecorded deed. The court held that, since the latter actually received the notice, though it was not addressed to it by name, and also had knowledge that the work had been done by the cotenants of its grantors, the notice was sufficient to forfeit its right, because the grantee, the real owner, had had full opportunity to protect itself from forfeiture. The case is distinguished in its facts widely from the present case. Here the cotenants, seeking to work the forfeiture, knew

that Bogy was not their cotenant; they knew that O'Hanlon had heirs who upon his death had succeeded to his estate, and that they would continue to hold as owners unless their title should be divested by sale during the administration. Since they had been associated with O'Hanlon in their prospecting enterprise, it is fair to presume that they knew of the two sons and that they were the only heirs. But, whether they did or not, they could have given notice by publication without making any inquiry. Besides, the offer to show by Bogy that he notified the sons that he had received the notice falls far short of showing that the notice actually came into their hands, or that the facts which the statute requires to be brought to the knowledge of the delinquent were thus communicated to them. Neither the notice nor the fact that Bogy conveyed to the sons the information merely that he had received it was, we think, material on the question of forfeiture. Nor, if it be assumed that Thomas J. O'Hanlon read the notice in 1901, was this sufficient to divest him of his title, for the time during which he might have complied with the demand it made for payment had long since expired. Even if the ruling of the California court should be accepted without question as sound, it ought not to be held applicable to a state of facts entirely different from that presented in the case before the court.

We think, however, that the evidence was competent and material as reflecting upon the subsequent conduct of plaintiffs, and, together with the other facts shown, as furnishing a basis for an inference of inexcusable delay in asserting their claim. The plaintiff Thomas J. O'Hanlon and his brother would thus have been shown to have known of the claim of Carter and McKenzie as early as February 5, 1900. So the plaintiff Henry J. O'Hanlon, having become the administrator on May 19, 1900, must likewise have known of it soon after, for his official duty required him to know, and the presumption must be indulged that he did know. Both knew of the development work that was being done by Carter and McKenzie and the defendant, and that they were claiming exclusive ownership. The evidence should

have been admitted and considered upon the question whether the plaintiffs should be charged with laches. The trial court found that they were not open to this charge. What conclusion it should have reached if the excluded evidence had been admitted and considered, we are not now required to decide, as that is a question to be determined in the first instance by the court below upon consideration of all the material evidence. The error committed in excluding this evidence was sufficiently substantial to entitle the defendant to a new trial as a matter of right.

The evidence was also competent and material upon the question of abandonment. As the term "abandonment" is defined [5] in the books in this connection, it means a leaving of the claim by the owner with the intention, expressed or implied, of never returning to it, or, in other words, leaving it open and free to location by anyone who chooses to take it. (*McKay v. McDougall*, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669; *Badger G. M. & M. Co. v. Stockton G. & C. M. Co.* (C. C.), 139 Fed. 838.) In this sense one cotenant cannot abandon a claim, because he cannot by any course of conduct destroy the interest of his cotenant so that the claim reverts to the United States; nor can his conduct inure to the benefit of the other cotenant. But, when his conduct is such that, if he were the sole owner, he would be held to have abandoned his right in a technical sense, may he thereafter assert title to the interest so renounced? To illustrate: A and B are tenants in common. Because A concludes that the claim is valueless, he leaves it, expressing the intention never to return. Without reference to what the subsequent events may have been, when his conduct has been made to appear, ought the court to say that, because the claim has been kept alive by B, and perhaps has been shown to be valuable, A's interest still remains as a valid, subsisting right? We do not think so. Having renounced his right, it is of no concern to him what thereafter becomes of the claim. He is not concerned with the question whether his abandonment inures to the benefit of B, or whether B asserts title to the whole; nor is

he concerned about whether the federal authorities will issue a patent conveying full title to B. So far as the court is concerned, he is entitled to no relief, because he shows no right. So far as his interest is concerned, it stands as if the claim had never been located. Under these or other circumstances justifying an inference that he has abandoned his interest, ought the court to treat his claim with any indulgence? On the contrary, he should be left under the disability he has brought upon himself, and be adjudged to have no standing in court to assert an interest or to question the interest of his cotenant or any other person whomsoever. On another trial the evidence should be considered as the basis for such inference as the court thinks it ought to draw from it in this behalf.

2. Counsel for defendant made no objection in the court below to the course pursued by the plaintiffs in the trial of the case. [6] They are therefore not now in position to insist that the court erred in treating the action at plaintiffs' instance as an ordinary one to quiet title, instead of an adverse suit under the federal statute. While it is true that the excluded cotenant may bring his adverse suit and have his rights determined, so [7] that the patent will convey directly to him whatever interest he shows himself entitled to (*Mattingly v. Lewisohn*, 8 Mont. 259, 19 Pac. 310; *Badger etc. Co. v. Stockton etc. Co.* (C. C.), *supra*; *Brundy v. Mayfield*, 15 Mont. 201, 38 Pac. 1067; *Turner v. Sawyer*, 150 U. S. 578, 37 L. Ed. 1189, 14 Sup. Ct. Rep. 192; 1 Lindley on Mines, secs. 646, 728), yet he is not bound to do so. He may ordinarily, if he chooses, wait until the conclusion of the patent proceedings, and then assert his equities in the patent title, and have the patentee declared a trustee for his benefit to the extent of his interest. (*Brundy v. Mayfield*; *Turner v. Sawyer*, *supra*.) This he may do by virtue of the well-settled rule that "cotenants stand in a certain relation toward each other of mutual trust and confidence; that neither will be permitted to act in hostility toward the other; and that a distinct title acquired by one will inure to the benefit of all." (*Turner v. Sawyer*, *supra*.) If this course is permissible, then, for the same

reason, the excluded cotenant may bring his action in the ordinary way, without reference to the patent proceedings, and proceed to judgment which will be effective to establish his right. The pendency of the patent proceedings could not be alleged to oust the state court of jurisdiction, for, if it is not too late to bring the action after the patent has issued, it certainly cannot be a fatal objection to it if brought pending the patent proceedings. We know of no rule by which, under the conditions presented in this case, so far as the objection urged by counsel avails, the plaintiffs are to be held bound by their election to bring the action as they did, or that precluded the trial court from treating the allegations touching the patent proceedings as surplusage, and proceeding with the case as an ordinary action to quiet title. Cases may arise in which the ousted cotenant must proceed under the federal statute; but the statute was intended to apply only to those cases in which there are adverse claims arising out of conflicting locations, or where the adverse claimants derive title from different sources. In any event, the facts of this case bring it clearly within the rule as announced in *Turner v. Sawyer* and *Brundy v. Mayfield*, *supra*, which hold directly in point against the contention of counsel. We know of no case which supports the text of Mr. Lindley, who expresses the opinion that, where one cotenant has wrongfully excluded another under circumstances which in law create an adverse holding, and set the statute of limitations in motion, the ousted cotenant must assert his right in the patent proceedings. (Lindley on Mines, sec. 728.) We do not regard the case of *Tabor v. Sullivan*, 12 Colo. 136, 20 Pac. 437, cited by counsel, as even persuasive in support of their contention. The parties in that case claimed under different deeds from the same source, executed prior to the issuance of patent. The question at issue was whether the grantor of plaintiff, who held under the one of the deeds which had first been recorded, had acquired his title as an innocent purchaser, and hence had conveyed a perfect title to the plaintiff. The court held that he had. Justice Elliott, in concurring, expressed the opinion that, since the claims of the

parties were "always conflicting, always adverse, never friendly, never confidential," the parties never became tenants in common, and hence that the defendants had lost any rights they had acquired under their deed by suffering patent to issue without asserting them by adverse proceedings under the federal statute.

3. The discussion in the foregoing paragraphs covers such consideration of the other two contentions made by counsel as may properly be devoted to them on this appeal.

Another question presented by the record, but not discussed by counsel, requires a brief notice. It is alleged in the complaint [8] and shown by the evidence that, when the action was brought, the defendant was in possession of the disputed ground, claiming to be the owner, and excluding the plaintiffs therefrom. The trial proceeded as if the action had been brought under section 6870 of the Revised Codes, instead of under section 6882 in pursuance of the provisions of the federal statute. Under the latter section it is immaterial which party is in possession of the disputed ground, it being sufficient to confer jurisdiction upon the court for all purposes, "if it appears from the pleadings that the application for patent has been made and an adverse claim thereto filed and allowed in the proper land office." The former section (Code Civ. Proc. 1895, sec. 1310) was examined in the original opinion in *Montana Ore Purchasing Co. v. Boston & Mont. Con. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1114, and also in the opinion delivered on rehearing in the same case, 27 Mont. 536, 71 Pac. 1005. It was distinctly held in that case that the purpose of the section was to confer upon courts of equity the power to entertain actions to quiet title in cases in which they therefore did not lie, viz., in cases in which the plaintiff is in possession and an adverse claim is asserted by the defendant, and in cases in which neither plaintiff nor defendant is in possession and the defendant is asserting an adverse claim. It was also pointed out that the plaintiff out of possession must, as against the defendant in possession asserting an adverse claim, resort to an action in ejectment, because under such circumstances he has an adequate remedy at law, and may

not resort to a court of equity. Under this interpretation of the section, the complaint in this case does not state a cause of action, and upon the evidence adduced the defendant was entitled to judgment. If upon another trial the plaintiffs furnish proof of the filing of the adverse claim, this infirmity in their case will be cured; otherwise they cannot maintain the action at all.

The order is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

FRANK ET AL., RESPONDENTS, v. BUTTE & BOULDER
MINING & LUMBER CO., APPELLANT.

(No. 3,274.)

(Submitted September 18, 1913. Decided October 11, 1913.)

[135 Pac. 904.]

*Contracts—Interpretation—Payment Out of Special Fund—
Nature of Liability—Appeal—Briefs—Assignments of Error
—Waiver.*

Appeal—Briefs—Assignments of Error—Waiver.

1. Assignments of error not argued in appellant's brief will be treated as waived.

Contracts—Payment Out of Special Fund—Nature of Liability.

2. *Held*, under the rules prescribed by the Codes for the interpretation of contracts, that by a writing which provided that a loan to a corporation should be repaid monthly "out of the first earnings of its business, after deducting running expenses," it was not intended to create a general liability on the part of the company to be paid after a reasonable time, but to make the indebtedness payable out of a special fund consisting of the net proceeds as rapidly as they accumulated.

Same—When Interpretation Unnecessary.

3. Where the words employed in a written contract are clear, certain and unambiguous, interpretation may not be resorted to to ascertain its meaning.

Same—Interpretation—Province of Courts.

4. It is the province of courts to interpret contracts which are open to interpretation, not to make new ones for the parties or to alter or amend those which they themselves have made.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Esther Frank and others against the Butte & Boulder Mining & Lumber Company. From a judgment for plaintiffs, defendant appeals. Remanded with directions.

Mr. John F. Davies, and *Mr. Louis E. Haven* submitted a brief in behalf of Appellant; *Mr. T. J. Davis*, of counsel, argued the cause orally.

The contract and agreement upon which this action rests, and upon which plaintiffs rely, is a conditional one. They must allege and prove, as a condition precedent to their right of recovery, the fact that there were earnings after deducting running expenses. Not having alleged and proven this, their complaint fails to state a cause of action. Provision is made in the agreement for the repayment of the loan in a particular manner. Such a provision is a material condition and cannot be disregarded or construed in any other way without making a new and different contract than intended by the parties. In *Bagley v. Cohen*, 5 Cal. Unrep. 783, 50 Pac. 4, the supreme court of California construing a contract similar to the one at bar, where the language used was "out of the profits of the business," held these words to mean that before there can be a recovery on the contract, the plaintiff must prove that the condition happened; must prove that there were profits actually earned; otherwise, he cannot recover. So, here, it is the contention of the appellants that plaintiffs must allege and prove that there were earnings in the business, before they can recover from the defendants herein. (See, also, *Rollins v. Denver Club*, 43 Colo. 345, 18 L. R. A. (n. s.) 733, 96 Pac. 188; *Lyman v. Northern Pac. Elevator Co.*, 62 Fed. 891; *Orman v. Ryan*, 25 Colo. 383, 55 Pac. 168; *Toombs v. Consolidated Poe Min. Co.*, 15 Nev. 444; *Blodgett v. Hall*, 11 Misc. Rep. 626, 32 N. Y. Supp. 788; *Zimmer v. Brooklyn Sub-Railway Co.*, 53 Hun, 637, 6 N. Y. Supp. 316.)

Mr. Chas. R. Leonard, for Respondents, submitted a brief and argued the cause orally.

It is the contention of the respondents that the provision in the contract in question does not limit repayment of the loan to Frank out of the first earnings of the business of the company; or, in other words, that such provision does not make repayment of the loan dependent or conditional upon earnings being made by the company. Stated differently, the respondents contend the contract in question does not in anywise limit the liability of the company to repay the loan made to it by Frank, but simply undertakes to afford security to Frank for the repayment of the loan made by him, and, in effect, operates to make him a preferred creditor of the company. While the question involved does not appear to have been decided in this state so far as we can ascertain, the highest courts of other states have had it before them for determination and decided in favor of the position taken by the respondents. (See *Busby v. Century Gold Min. Co.*, 27 Utah, 231, 75 Pac. 725; *Nunez v. Dautel*, 19 Wall. (U. S.) 560, 22 L. Ed. 161; *Harkinson v. Dry Placer Amalgamating Co.*, 6 Colo. 269; *Williston v. Perkins*, 51 Cal. 554; *Button v. Higgins*, 5 Colo. App. 167, 38 Pac. 390; *Johnston v. Schenck*, 15 Utah, 490, 50 Pac. 921; *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687; *Hood v. Hampton Plains Exploration Co.*, 106 Fed. 408; *Noland v. Bull*, 24 Or. 479, 33 Pac. 983; *Pistel v. Imperial Mut. Life Ins. Co. of America*, 88 Md. 552, 43 L. R. A. 219, 42 Atl. 210; *Smithers v. Junker*, 41 Fed. 101, 7 L. R. A. 264; *Hicks v. Shouse*, 17 B. Mon. (56 Ky.) 483; *Noyes v. Barnard*, 63 Fed. 782, 11 C. C. A. 424; *Salisbury v. Spofford*, 22 Idaho, 393, 126 Pac. 400.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On July 20, 1906, an agreement was entered into between Margaret Northey, Stephen H. Northey, the Butte & Boulder Mining & Lumber Company and H. L. Frank. This agreement is prefaced by an introductory clause which recites that the min-

ing and lumber company had been organized for the purpose of taking over certain mining claims and water rights belonging to Margaret Northey, and for carrying on a general lumber business, and that it was necessary for the company to borrow \$30,000 to carry out the purposes of its organization. These recitals are followed by the contracting portions of the agreement, which are: (1) Frank agrees to loan the company \$30,000. (2) The mining company agrees to transfer to Mrs. Northey, in payment for the mining claims and water rights, 24,995 shares of its capital stock, being all of its capital stock excepting five shares, the shares being of a par value of \$10 each. (3) Mrs. Northey agrees to transfer 9,000 shares of the stock to Frank without any further consideration and as a bonus to him for making the loan to the company. She further agrees to retransfer 1,000 shares to the treasury of the company, to be used in purchasing a sawmill. (4) All the parties agree that the capital stock of the company shall not be increased without Frank's consent. (5) Mrs. Northey agrees to convey to the company the mining claims and water rights mentioned. (6) Stephen H. Northey is to have the use of the surface ground of the mining claims for farming purposes, and he is to be the general manager of the company, with an assistant, to be designated by Frank, who shall have charge of the books and accounts of the company. (7) Until Frank's indebtedness is paid he is to be one of the directors of the corporation and to have the right to name another director. (8) Stephen H. Northey agrees to transfer to the company a certain tie contract which he had with the Milwaukee Railway Company. (9) All the parties agree that no dividends are to be declared until Frank shall have been repaid. (10) All the stock is to be pooled and placed in the First National Bank of Butte, with an agreement that, if any sale of any stock is made, the proceeds shall be divided among the members of the pool in accordance with their respective holdings. The contract further provides: "It is further understood and agreed that the said thirty thousand dollars so advanced and to be advanced by the said H. L. Frank, shall be repaid to

the said H. L. Frank by the said company, out of the first earnings of its business, after deducting running expenses, which said earnings are to be computed and paid over at the monthly meetings of the board of directors of said company." The contract is executed on behalf of the company by Frank, president, and Genzberger, secretary.

This action was brought by the heirs of Frank, to recover as for an indebtedness due. They allege the execution of the contract; that the money was actually furnished by Frank and used by the company; that no part has ever been repaid; that the company has never realized any earnings in the operations of its business after deducting its running expenses; and that a reasonable time has elapsed since the defendant received the money from Frank. There is a second cause of action upon an assigned claim. The answer admits the execution of the contract, denies that there is anything due, and sets forth some affirmative matters, which, however, were on motion stricken out, and no exception was reserved. The trial court found the issues in favor of the plaintiffs and rendered judgment for the whole amount claimed upon both causes of action. From that judgment this appeal is prosecuted.

While the appellant in its brief asserts that the complaint does not state a cause of action upon either cause of action set forth in the complaint, no argument whatever is offered in support of that contention, as it applies to the second cause of action, [1] and, under the rule recognized by this court that assignments not argued will be treated as waived (*Winterscheid v. Reichle*, 45 Mont. 238, 122 Pac. 740; *Brian v. Oregon Short Line R. Co.*, 40 Mont. 109, 20 Ann. Cas. 311, 25 L. R. A. (n. s.) 459, 105 Pac. 489; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860), nothing further need be said than that, in our opinion, the second count states a cause of action.

The principal contention arises over the construction of that [2] clause of the contract quoted above. The contention of respondents is that the contingency mentioned in the contract that repayment should be made out of the net earnings of the

company merely postpones the time of payment, and that upon the expiration of a reasonable time the obligation becomes absolute and can be enforced, whether there were any net earnings of the company or not. And in support of this contention a number of cases are cited, including *Nunez v. Dautel*, 19 Wall. 560, 22 L. Ed. 161; *Noland v. Bull*, 24 Or. 479, 33 Pac. 983; *Smithers v. Junker* (C. C.), 41 Fed. 101, 7 L. R. A. 264; *Hicks v. Shouse*, 17 B. Mon. (Ky.) 483; *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687, and other cases of like character; but in every one of those cases there was a pre-existing indebtedness, and the contingency mentioned referred only to the time of payment. In our opinion, those cases are not in point. Other cases cited, however, including *Harkinson v. Dry Placer Amalgamating Co.*, 6 Colo. 269, *Johnston v. Schenck*, 15 Utah, 490, 50 Pac. 921, and *Busby v. Century Gold Min. Co.*, 27 Utah, 231, 75 Pac. 725, are cases somewhat similar in their facts to the one before us, and the decision in each is in harmony with the theory of respondents in this case.

Appellant relies upon cases which hold that a contingency, such as the one before us, affects the liability, renders the obligation conditional, and imposes upon the party seeking its enforcement the burden of showing that the contingency has happened or the condition has been fulfilled, before recovery can be had. Among the cases are *Blake v. Coleman*, 22 Wis. 415, 99 Am. Dec. 53; *Lyman v. Northern Pac. Elevator Co.* (C. C.), 62 Fed. 891; *Munro v. King*, 3 Colo. 238; *Toombs v. Consolidated Poe M. Co.*, 15 Nev. 444; *Breaux v. Lauve*, 24 La. Ann. 179; *Tebo v. Robinson*, 100 N. Y. 27, 2 N. E. 383; *Orman v. Ryan*, 25 Colo. 383, 55 Pac. 168; and *Congdon v. Chapman*, 63 Cal. 357. The conflict, however, between the cases cited by appellant and those relied upon by respondents, is more apparent than real. Every case has been decided upon its own peculiar facts and surrounding circumstances, the courts being unable to formulate any definite, general rule upon the subject. The authorities are therefore of little, if any, value as precedents.

There is not anything peculiar about the contract before us. There is not any question of fraud or mistake involved. The parties do not seek to have the contract reformed; on the contrary, they rely upon it as it was written, and we are to determine its meaning by the rules which our Codes prescribe. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Rev. Codes, sec. 5025; *State ex rel. Coburn v. District Court*, 41 Mont. 84, 108 Pac. 144.) "The language of a contract is to govern its interpretation if the language is clear and explicit, and does not involve an absurdity." (Section 5027; *Quirk v. Rich*, 40 Mont. 552, 107 Pac. 821.) "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title." (Section 5028; *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111.) In *Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761, this court said: "It is a well-settled rule of law that the circumstances under which a contract is made, or the intent of the parties existing at that time, are only material when the contract is ambiguous in some of its terms. If it is plain and unambiguous, it needs no construction, and it is the duty of the court to enforce it as made by the parties."

In the contract before us the parties appeared entirely capable of expressing themselves in plain, terse English. No one complains that the language employed is not explicit or that it is [3] open to construction. Under like circumstances, in *Harris v. Root*, 28 Mont. 159, 72 Pac. 429, Chief Justice Brantly, speaking for the court, said: "The contract is clear and explicit in its terms, and its construction involves no difficulty. To its language alone, therefore, must we look in order to find the intention of the parties." In speaking of the provisions of section 5025, above, this court, in *Quirk v. Rich*, *supra*, said: "This section simply means that the intention of the parties shall be ascertained in the first instance by reference to the language employed by them. Where the words used are clear, certain and

unambiguous, interpretation may not be resorted to." There are not any words in this agreement employed in a strictly technical sense, and those that are used are therefore to be understood according to their ordinary and popular meaning. (Rev. Codes, sec. 5033.) Taking this contract before us as it is written and giving to its words their ordinary and popular meaning, the result cannot be in doubt. The parties explicitly agreed that Mr. Frank should be paid from a special fund as rapidly as it should be accumulated. The meaning of the parties is not left in doubt. If it was their intention to create a general liability on the part of the mining company which would subject all of its property to seizure in satisfaction of Frank's claim, why, then, should they say, in the portion quoted above, that Frank's indebtedness was to be paid out of the first net earnings of the company's business?

In *Lyman v. Northern Pac. Elevator Co.*, above, it appeared that the elevator company issued its notes or evidences of indebtedness which provided that they should be "paid out of the first net earnings of the company"; of this Judge Williams said: "It is very clear from the agreement and note, which must be read as one paper, that there is no liability of the company on this note, except out of the net earnings, and that, if net earnings have not been made, it cannot be contended that the company is liable for the face of the note as absolutely as if there was no provision either in the note, or in the contract of August 15, 1890, respecting the payment out of the net earnings. Certainly, the clause was inserted for some purpose—either to limit the liability or to add to the security of the stockholder. It certainly does not add to his security, for if no provision had been inserted when the note became due, not only the net earnings but all of the company's property could have been applied to the payment of the note. It therefore limited the company's liability to the net earnings. If it was intended as a pledge of the net earnings as security, such language would have been used in the contract; but the contract does not provide that the net

earnings are pledged as security, but rather limits the payment to the net earnings.”

Whatever impulses may control individual action, courts must [4] be governed by law. It is their province to interpret contracts which are open to interpretation, or they may enforce obligations, but it is beyond their power to make agreements for parties or to alter or amend those which the parties themselves have made. (*McCrimmon v. Murray*, 43 Mont. 457, 117 Pac. 73.) In order to uphold this judgment, we must say that these parties agreed to repay Frank within a reasonable time out of the net proceeds of the company's business, if there were any, but, if there were none, then out of the property of the company generally. To do this would be to create a new obligation so far different from the one which the parties themselves executed that they would never recognize it.

In *Congdon v. Chapman*, above, there was involved a writing by which Chapman agreed to pay Congdon for certain shares of stock in a mining company ten cents per share “from the first moneys which can be realized from the sale of any stock of said company owned or controlled by him; * * * and said Chapman agrees to use all reasonable efforts to realize on the stock of said company owned or controlled by him without unnecessary delay, to the end that said payment may be made to said Congdon.” In an action by Congdon against Chapman to enforce payment upon the theory that the shares were to be paid for within a reasonable time, whether Chapman sold his stock or not, the court held the defendant not liable, and said: “By this agreement the parties clearly expressed their intention that the stock should be paid for out of the first moneys that could be realized from the sale of any stock of the company owned or controlled by Chapman; the latter further agreeing to use all reasonable efforts to realize on the stock without unnecessary delay, ‘to the end that said payment may be made to said Congdon.’ At the trial the court below found that the defendant used reasonable diligence and made all reasonable efforts to sell the stock, but had been unable to sell any of it. Under such

circumstances, to hold the defendant liable in this form of action would be to make and enforce between the parties a contract essentially different from the contract that they themselves made and from that declared on herein."

In so far as the judgment in favor of the plaintiffs is based upon the first cause of action it is erroneous. The cause is remanded to the district court, with directions to dismiss the complaint as to the first cause of action and to enter judgment in favor of plaintiffs upon the second cause of action *nunc pro tunc*, as of the date of the original judgment. Each party will pay his own costs of this appeal.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

GAUSS, RESPONDENT, v. TRUMP, ADMX., APPELLANT.

(No. 3,275.)

(Submitted September 19, 1913. Decided October 11, 1913.)

[135 Pac. 910.]

Executors and Administrators—Claims Against Estate—Presentation—Pleadings—Conclusions—Quantum Meruit—Evidence—Weight for Jury—Review—Oral Contracts—Modification—Defective Judgment.

Pleading—Implication—Construction.

1. As against an attack for lack of substance, whatever is necessarily implied in, or reasonably to be inferred from, an allegation of a pleading is to be taken as directly averred.

Executors and Administrators—Claims Against Estate—Presentation—Pleadings—Conclusions.

2. An averment in plaintiff's complaint against an administratrix to recover the reasonable value of services rendered her intestate, that on a certain day and "before the time for presentation of claims against the said estate had expired" he had presented his claim to the defendant, etc., held not open to the objection that, as to the fact that the claim had been presented within the time prescribed in the notice to creditors of the estate, it stated a mere conclusion of law; held, further, that in the absence of a special demurrer or motion, such an inferential allegation will support proof.

[As to the statement of claims against estates of decedents, see note in 130 Am. St. Rep. 311.]

Same—Evidence—Weight of, for Jury—Review.

3. As in other actions, so in one against the estate of a deceased person, the jury are the judges of the weight of the testimony and the credibility of the witnesses, and the supreme court, in passing upon the sufficiency of the evidence to support the verdict in such a case, will be guided by the same canons of review which obtain in other actions at law.

Same—Oral Contracts—Modification—Evidence—Sufficiency.

4. Evidence in an action to recover from an estate on a *quantum meruit* for services performed for decedent under an alleged agreement, by the terms of which she agreed to devise her ranch to plaintiff in consideration of his managing the same during her lifetime, *held* sufficient to warrant the jury in finding in favor of plaintiff, inasmuch as, though it showed a departure by him from the agreement as originally made, it also disclosed a modification of the original agreement and performance on his part so far as performance was required of him under such modification.

Same—Defective Judgment.

5. A judgment in an action against an administratrix to recover for services rendered to deceased, to the effect that plaintiff "have and recover" from the defendant, as administratrix, the amount of the verdict and costs, though defective under section 7536, Revised Codes, does not require a reversal of the judgment.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by John Gauss against Louise C. Trump, as administratrix with will annexed of Olive Ahrens, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Messrs. Tolan & Gaines, and Mr. Geo. T. Baggs, for Appellant, submitted a brief. Mr. R. F. Gaines argued the cause orally.

By the provisions of section 7532, Revised Codes, the presentation of a claim against the estate is a condition precedent to the maintenance of the action; and by section 7525 a presentation of it within the time limited in the notice is a prerequisite to recovery. The sections of the statutes above and the decisions of this court with reference to necessary allegations in statutory proceedings clearly demand, in a complaint in an action of this character, a showing of the presentation of the claim and that within the time limited in the notice. (*Miley v. Northern Pac. R. Co.*, 41 Mont. 51, 108 Pac. 5; *Kelly v. Northern Pac. R. Co.*, 35 Mont. 243, 88 Pac. 1009.) This showing must be made by pleading facts—not conclusions. The pleading of conclusions as

distinguished from facts is of no avail either to raise an issue or to render support to a pleading the sufficiency whereof is challenged. (1 Sutherland's Code Pleadings & Practice, sec. 95; *Parks v. Barkley*, 1 Mont. 514; *McCauley v. Gilmer*, 2 Mont. 202; *Kipp v. Davis-Daly Copper Co.*, 41 Mont. 509, 21 Ann. Cas. 1372, 110 Pac. 237; *Pullen v. City of Butte*, 38 Mont. 194, 21 L. R. A. (n. s.) 42, 99 Pac. 290.)

In actions of this character, decisions holding as a general rule that when the sufficiency of the evidence to sustain a verdict is challenged, the verdict will not be disturbed in the supreme court, if there is any evidence to support it, are not in point, because of the generally one-sided nature of such transactions when claims are advanced against the estates of decedents. (*Holmes v. Connable*, 111 Iowa, 298, 82 N. W. 780; *Wallace v. Rappleye*, 103 Ill. 229; *Graham v. Graham's Exrs.*, 34 Pa. 475; *Brewer v. Hieronymus*, 19 Ky. Law Rep. 645, 41 S. W. 310; *Rosseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916; 18 Cyc. 530, and cases cited.)

The form of judgment is defective. California has a provision similar to that found in section 7536, Revised Codes, and it has been construed by the supreme court of that state several times—among others in the case of *Vance v. Smith*, 124 Cal. 219, 56 Pac. 1031, and *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166, 65 Pac. 624, and judgments like the one at bar have been modified in the appellate court so as to comply with the statutory mandate.

Messrs. O'Hara, Edwards & Madeen, for Respondent, submitted a brief; *Mr. R. A. O'Hara* argued the cause orally.

Conceding that the allegation attacked is a mere legal conclusion, and that the publication of notice to creditors is not sufficiently pleaded, there remains an allegation that on September 19, 1911, the plaintiff made and presented his claim to the administratrix. This is a sufficient allegation of the presentation of the claim as against a general demurrer, or an objection to the introduction of any evidence, for the reason that

the complaint does not state facts sufficient to constitute a cause of action. "It is not the publication of notice which is a prerequisite to maintenance of action or claim, but the proper presentation of the claim and its rejection." (*Janin v. Browne*, 59 Cal. 37; *Ricketson v. Richardson*, 19 Cal. 330; *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278.) Furthermore, the objection that the claim was not presented, which is virtually the effect of the objection made, is made for the first time in this court, and this cannot be done. (*Bank of Stockton v. Howland*, 42 Cal. 129; *Coleman v. Woodworth*, 28 Cal. 567.) The most that can be said against the complaint is that it is uncertain, but these matters are cured by answer and proof. The answer admits the presentation of the claim and its rejection, as alleged. And counsel for defendant, admitted during the trial that the claim was filed with the administratrix within the legal time. Under these circumstances, the defect, if any existed, has been cured. (*Hershfield v. Aiken*, 3 Mont. 442; *Spencer v. Montana Cent. Ry. Co.*, 11 Mont. 164, 27 Pac. 681; *Raymond v. Wimsette*, 12 Mont. 551, 33 Am. St. Rep. 604, 31 Pac. 537.)

We contend that there is abundant evidence in the record that the plaintiff remained on the farm after the death of decedent's husband, under a promise or agreement that, in exchange for his services, he would be the beneficiary under her will; that he rendered faithful service to decedent and that she failed to carry out her promise, and the plaintiff is entitled to recover the reasonable value of his work. (*Grant v. Grant*, 63 Conn. 530, 38 Am. St. Rep. 379, 29 Atl. 15; *Estate of Kessler*, 87 Wis. 660, 41 Am. St. Rep. 74, 59 N. W. 129.) Page on Contracts, section 749, states the rule as follows: "If A renders services to B in consideration of an oral agreement by B to devise certain real estate to A, A can recover reasonable compensation from B's estate for the services thus rendered."

MR. JUSTICE SANNER delivered the opinion of the court.

The complaint of respondent alleges in substance that about May 15, 1906, he entered into an oral contract with Olive Ahrens,

now deceased, in and by which it was agreed that he should perform work and labor in the care and management of her ranch during her lifetime in consideration that she should furnish him food, clothing, and other necessities of life and that she should devise her said ranch property to him at her death; that he thereupon entered upon the duties thus imposed upon him and continued to discharge them until her death on December 14, 1910, and fully performed the contract on his part; that in March, 1910, "the said agreement was by mutual consent so modified that he, instead of receiving each year an unliquidated sum as and for necessities under said agreement, took a lease of the premises which provided that he should receive one-half of the proceeds thereof, which was executed in lieu of the provision in said agreement for necessities"; that his services rendered to her under the agreement were of the reasonable value of \$75 per month, or \$3,450 in all, no part of which has been paid; that Olive Ahrens died testate, but her will, which was duly admitted to probate, contained no devise or bequest whatever to him; "that thereafter, and after publication of notice to creditors of the estate of the said Olive Ahrens, deceased, had been made and before the time in said notice specified for the presentation of claims against the said estate had expired, and on or about the 19th day of September, 1911, the plaintiff * * * presented his claim for the reasonable value of the services aforesaid * * * duly verified, * * * to the defendant herein as administratrix, * * * which claim was rejected; that thereafter, and on or about the 7th day of October, 1911, and before the time for presentation of claims against the said estate had expired," the plaintiff presented an amended statement of his claim, duly verified, which claim received no action on the part of the administratrix, though more than ten days have elapsed.

The answer admits that in the will of Olive Ahrens there is not any devise or bequest to plaintiff; that plaintiff presented his claim on September 19, 1911, which was rejected; that he presented his amended claim on October 7, 1911, and that more

than ten days have elapsed since said presentation; alleges that if plaintiff ever did any work for Olive Ahrens he has been fully paid for the same, and that in the will of Olive Ahrens it is stated that the reason she makes no special bequest to him is because she feels that she has provided for him as much as the situation demands. Otherwise than as above set forth, the answer denies all the allegations of the complaint and also pleads a counterclaim upon a promissory note for \$100, given by the respondent to Olive Ahrens on November 24, 1909. The reply admits the execution of the note but otherwise denies all the allegations of new matter contained in the answer.

The cause was tried to the court sitting with a jury, and the verdict was for the respondent, upon which judgment was entered to the effect that respondent "have and recover from said Louise C. Trump, as administratrix," the sum of \$3,694.50, with costs amounting to \$105.50. Appellant made and presented her motion for new trial, which was denied, and from the order denying a new trial, as well as from the judgment, she appeals.

But three questions are presented, *viz.*: Does the complaint state a cause of action? Does the evidence support the verdict? Is the judgment valid in form? Of these in their order.

1. The burden of the attack upon the complaint is that the [1,2] action is under a special statute authorizing suits to vindicate rejected claims against estates; that the plaintiff must in every such case bring himself within the statute by appropriate averments to the effect that his claim was presented in time; that the complaint does not show this, the allegations relative thereto and quoted above being mere conclusions instead of direct allegations from which the necessary conclusions might be drawn by the proper authority. The cases cited by counsel all hold that conclusions of law are ineffective for any purpose in pleading—a proposition indisputable and last enunciated by this court in *Ridpath v. Heller*, 46 Mont. 586, 129 Pac. 1054—but that a claim was presented within the time prescribed in a notice is a clear matter of fact implying proof of the time of presentation as well as of the notice and its terms, leaving the deter-

mination of the legal effect to the court. It may be conceded that the allegation in question is not in the best possible form, but it is an obvious attempt to state the fact in its ultimate, issuable aspect and at most is an inference rather than a conclusion of law. Argumentative and inferential averments are, it is true, as obnoxious to good pleading as are conclusions of law, but their value is not the same. Conclusions of law, unsupported by the essential averments of fact, are always ineffective; but, as against an attack for lack of substance, the allegations of a pleading are to be liberally construed, with a view to substantial justice between the parties (Rev. Codes, sec. 6566), and whatever is necessarily implied in, or is reasonably to be inferred from, an allegation is to be taken as directly averred. (*County of Silver Bow v. Davies*, 40 Mont. 418, 107 Pac. 81.) Where the inferential allegations of a pleading are not attacked by special demurrer or motion, as may be appropriate, we know of no modern authority which denies the right of the pleader to make proof under them; and that such an allegation as the one before us will support proof was intimated in *Jones v. Rich*, 20 Mont. 289, 50 Pac. 936, and expressly decided in *Wiss v. Hogan*, 77 Cal. 184, 19 Pac. 278. To all this we add the statutory injunction that no judgment shall be reversed by reason of any error or defect in the pleadings which does not affect the substantial rights of the parties. (Rev. Codes, sec. 6593.)

2. That the original agreement between the respondent and Olive Ahrens was substantially as alleged in the complaint, and that for over three years the respondent cared for and managed her ranch under it, is abundantly proved. The complaint, however, conceding that it was not fully performed according to the original terms, pleads a modification, and the questions of fact seriously debated are: Was there such a modification? and, if there was, did the respondent perform the agreement so far as
ance was required of him?

e urged by appellant's counsel to remember in approach-
; this question that claims such as the one at bar are easy
and hard to disprove; that the only witness who could

specifically deny the alleged modification, establish nonperformance of the agreement, or show that full compensation had been made, is dead; that no defense is possible save as it may be found in the improbability of the stories of the plaintiff's witnesses when tested by comparison with other evidence in the case or by ordinary rules of human conduct under similar circumstances. In so far as this admonition implies that courts generally should scrutinize with more than usual care the quality of the proof presented in such cases, assent may be given; and, in so far as the proof consists of oral declarations of the deceased, caution was enjoined upon the trial court and jury by the statute. (Rev. Codes, sec. 8028; *Escallier v. Great Northern R. Co.*, 46 Mont. 238, 127 Pac. 458.) We can find, however, no authority in our Code for the application of any different rule as to the *quantum* of proof from the one prescribed for civil actions generally or for the assertion that this court may or should employ any different canons of review from those which obtain in other actions at law. The jury, who were the judges of the weight and credibility of the testimony, the trial judge, who, if he thought the verdict contrary to the weight of the evidence, could have set it aside, have expressed their satisfaction with the respondent's contention. It is to be presumed that they exercised all the caution and scrutiny enjoined upon them by the law, and it is not to be supposed that they were any the less solicitous for the integrity of decedents' estates than are we. The question before us is, therefore, the same as in other appeals in actions at law, *viz.*, whether there is any substantial evidence to support the verdict of the jury.

Turning, then, to the evidence, we ascertain that after respondent had cared for and managed the property under the original agreement for the period of forty-six months and until March, 1910, he then took the ranch for a year on shares. In October, 1910, after the harvest season, he left the place and took a position with one Joslyn, and the place was leased to one Markwell for the period to expire March 1, 1912. Doubtless these naked facts, if unexplained, would suffice to defeat the

respondent, for they would show that he had not performed his contract and would suggest that it had been terminated by mutual consent. But there are items of evidence which show the situation from and after March 1, 1910, when respondent took the ranch on shares, to have been otherwise than either an abandonment of the contract or a failure to perform by him. He testifies: "The agreement I had with Mrs. Ahrens was modified and I took the ranch on shares March 1, 1910, to March 1, 1911. * * * After I got married Mrs. Ahrens said, 'John, you better take the place and lease it; your wife will need money and won't feel like coming to me for it; and you lease the place and whatever you make off the crop when you need money you will be able to get it for yourself.' Mr. Joslyn came down there to buy some hogs; he first came down to buy some cows; we sold him the cows and then he came back the next day and he said, 'I would like to get hold of a man like you.' I told Mrs. Ahrens what Mr. Joslyn was going to give me, and she said, 'You go up there and try it a year.' I was there (at the Ahrens place) off and on up to the time of her death; when I came down town I would stop there."

Phil. Wagner testified: "I had some talks with Mrs. Ahrens regarding the situation after John moved off the place; one thing was he was getting good wages and another thing they didn't have any suitable place for him to live and they couldn't very well live there together; she intended to build across the road from there. * * * I think it was last fall, a year ago, that he left the Ahrens place. Markwell moved into the little house that Gauss occupied, and Mrs. Ahrens told me she had rented the place to him for the next year."

Mrs. Markwell testified: "We moved onto this land October 9, 1910; we were to have the place until the 1st of March, 1912; I told her (Mrs. Ahrens) we did not want to rent it for one year, and she said she did not think Mr. Gauss would be gone for more than a year. Mrs. Ahrens told me that Mr. Gauss was going to Dakota to look after some property belonging to his wife."

George Johnson testified: "The last time I saw Mrs. Ahrens was at my house about the middle of October, before she died; she said she had her will made and she was giving the bulk of her property to John Gauss. John was not living on the ranch at that time; she said he had gone over to Joslyn's temporarily."

C. B. Calkins testified that sometime in 1906 or 1907 Mrs. Ahrens had executed a will in his possession in which all her property was devised to John Gauss.

In their able brief for appellant, counsel say: "The reason he did not stay there and take care of the ranch until the death of Mrs. Ahrens was because the parties had made some new separate agreement which Mrs. Ahrens, now dead, cannot detail and which John Gauss chooses not to state." This may indeed be.

[4] It could be wished that the evidence were more satisfactory, for there are circumstances which tend to give color to the theory of a mutual abandonment of the agreement. But these circumstances were all before the jury; the inferences to be drawn from the testimony were within their province; and, though there was room for a contrary conclusion, it is also a legitimate inference from the testimony that the change from the agreement as originally made to the lease on shares and from that to the temporary sojourn at Joslyn's were with Mrs. Ahrens' entire approval and without any understanding that the agreement was to be affected thereby. If this were the fact, nothing could prevent a recovery on *quantum meruit* against her had she lived and afterward repudiated the agreement. She alone had the right to say whether he had, up to that time, kept the agreement to her satisfaction or whether she should regard his conduct as a breach thereof (*Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742); if she did not so regard it, if she acquiesced with apparent satisfaction in what he had done, but thereafter determined not to abide by the agreement, her subsequent death could not deprive him of the same remedy.

3. The form of the judgment is assailed, and rightly so. It [5] provides that the plaintiff "have and recover" from the

defendant, as administratrix, the amount of the verdict and costs, whereas, it should simply have adjudged that the defendant, as administratrix, pay in due course of administration the amount ascertained to be due. (Rev. Codes, sec. 7536.) But this does not affect any substantial right and forms no ground of reversal.

It is ordered that, upon the return of the cause on *remittitur*, the district court correct the judgment to comply with section 7536, Revised Codes, the judgment to stand affirmed as corrected. The order denying a new trial is also affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

BARNARD REALTY CO., APPELLANT, v. CITY OF BUTTE,
RESPONDENT.

(No. 3,271.)

(Submitted September 17, 1913. Decided October 15, 1913.)

[136 Pac. 1064.]

Quieting Title—Cities and Towns—Streets and Alleys—Prescription—Burden of Proof—Evidence—Adverse Use—Insufficiency—Statutes.

Cities and Towns—Streets and Alleys—Prescription—Burden of Proof.

1. Defendant city, asserting title to real property by reason of a right acquired through adverse use, had the burden of establishing, by direct or circumstantial evidence, every element necessary to constitute its alleged claim, one of which elements was the fixing of a definite date at which the statute of limitations began to run.

Same—Adverse Use—Evidence.

2. Where the only evidence tending to show the date at which defendant city assumed to exercise control over land, title to which it asserted under the doctrine of prescription, by the construction of a ditch thereon, was to the effect that the work had been done in June or July of a certain year and that it required two or three days to complete it, the only rational conclusion deducible therefrom was that it was not done until the last two or three days of July; *held*, therefore, that the statute was not put in motion until July 28 of that year.

[As to the establishment of highways by prescription, see note in 57 Am. St. Rep. 744.]

Same—Adverse Use—Insufficiency.

3. Under section 1340, Revised Codes (sec. 2603, Pol. Code, 1895), the mere use of land by the public as a street for the statutory period, not coupled with an assumption of jurisdiction over it by the city authorities, was insufficient to clothe the city with title by prescription.

Same—Public Highways—Definition—Statutes.

4. *Obiter*: By section 1337, Revised Codes (sec. 2600, Pol. Code 1895), those roads only are declared to be public highways which had been established by the public authorities or were recognized by them and used generally by the public, or which had become such by prescription or adverse use, at the time of its enactment.

Same—Streets and Alleys—Control—Statutes.

5. *Held*, that though sections 1337 and 1340, Revised Codes, are parts of an Act relating in terms to county roads (Laws 1903, Chap. 44), the legislature in providing in the former that not only roads, but also streets, alleys, *etc.*, should be deemed public highways, and in the latter that no highway as thus defined should be vacated otherwise than as provided therein, and no route of travel should thereafter become a highway by mere use not coupled with a declaration to that effect by the county commissioners, impliedly ordained that use of a strip of land within the limits of a city or town for street or alley purposes should not be deemed adverse until assumption of jurisdiction over it by the city authorities; *held*, further, that by naming, in the latter section, the board of county commissioners only as the agency through which roads, streets, *etc.*, may be established or vacated, it was not intended to invest the board with, and deprive the city authorities of, control over streets, alleys, *etc.* (See, also, opinion on motion for rehearing.)

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by the Barnard Realty Company against the city of Butte to quiet title. Decree in favor of defendant. Plaintiff appeals from it and an order denying its motion for a new trial. Reversed and remanded.

Messrs. Edwin M. Lamb and E. B. Howell, for Appellant, submitted a brief, and argued the cause orally.

In behalf of Respondent there was a brief by Messrs. John A. Smith, N. A. Rotering, and H. Lowndes Maury; Mr. Alex Mackel, of counsel, argued the cause orally.

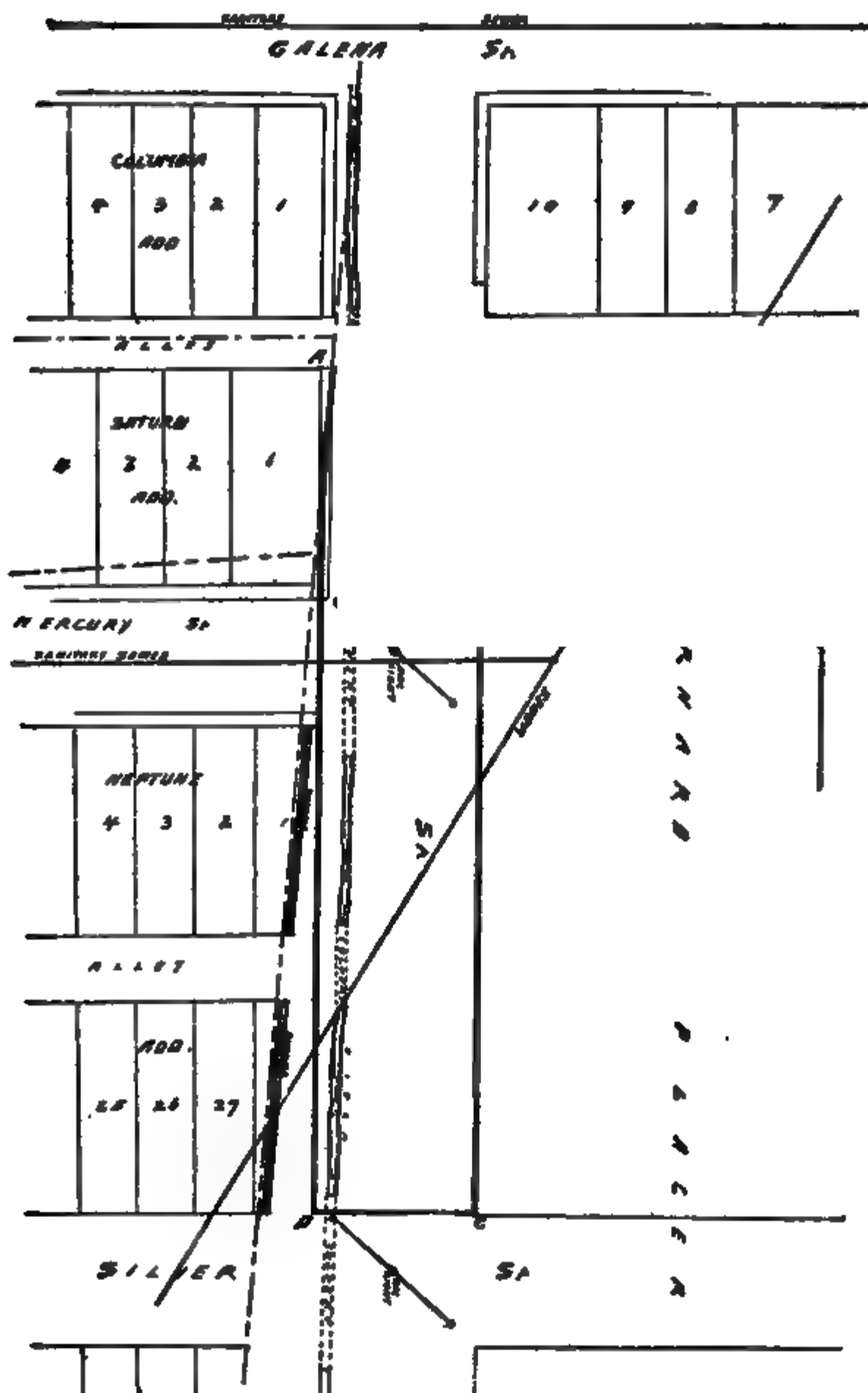
MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff brought this action on July 19, 1911, to obtain a decree quieting its title to the property described in the com-

plaint, which is situated within the corporate limits of the city of Butte and consists of a strip of land extending from the south line of the alley immediately south of Galena street to the north line of Silver street. Its boundaries are indicated on the subjoined diagram by the heavy lines inclosing the area A, B, C, D, a part of the area designated as the Barnard Placer, the dotted line being the western boundary of the latter. The question involved is whether the described area is a part of Alabama street. The defendant, admitting that the record title is in plaintiff, pleaded as a defense that for the full period of ten years prior to the bringing of the action it had been in the open, notorious, uninterrupted, exclusive and adverse possession of the disputed area and used the same as a public street, and was therefore the owner of an easement over it for a public street. The district court found the issues in favor of the defendant and entered a decree accordingly. The plaintiff has appealed from the decree and an order denying its motion for a new trial.

Counsel have made many assignments of error in their brief, but since the only substantial argument made is confined to the assignment that the evidence is insufficient to sustain the findings, we shall deem the other assignments waived and devote our attention to the single question thus submitted.

The evidence introduced by the defendant tends to establish the following: The area shown on the diagram to the north of the alley and east of the dotted line was originally a part of the Barnard Place. In the year 1889 Barnard, the owner, caused it to be subdivided into blocks and lots and made it an addition to the city. The portion of this area north of the south line of the alley was thus formally dedicated to the use of the public, presumably as an extension of Alabama street from the north. The dedication apparently included also the extension of the alley to the east. The area to the west of the dotted line from Galena street south is embraced in three distinct additions made to the city by other persons at about the same date, the portion north of the alley being a part of the Columbia Addition, that



between the alley and Mercury street a part of the Saturn Addition, and that further south a part of the Neptune Addition.

All the portions of these areas designated as streets and alleys up to the dotted line were thus formally dedicated to public use. The rest of the Barnard Placer east of the dotted line has been uninclosed and accessible to public travel. The fractional lots lying west of the line have been held or sold by the respective plat owners as fractional lots, the plaintiff and its predecessor having at all times refused to sell any portion of the area between the dotted line and the west line of the disputed area. Many of the lots in the Saturn and Neptune Additions are now occupied by dwellings, some of which were erected more than ten years prior to the bringing of this action, and others of them within ten years. One of these, situated on lot 1 in the Saturn Addition at the corner marked "A," fronts to the east. A narrow sidewalk constructed of boards extends from the north line of Silver street along the course of the dotted line to the south line of Mercury street. This has been constructed from time to time by owners of lots bordering on the Barnard Placer, to facilitate access toward Galena street from the south, but without permission of plaintiff or its predecessor. Extending north from Mercury street there is a sidewalk which follows the direction of the east line of the Saturn Addition, and encroaches slightly upon the disputed area. It does not appear who constructed this. During the year 1905 the area designated as Silver street east of the dotted line was, as a result of negotiations had with Barnard, opened as a public street and has since been graded and used as such. These negotiations had no relation to an extension of Alabama street, the purpose entertained by the city apparently being only to extend Silver street to the east to accommodate the residents along it toward the west. Some time subsequent to the beginning of the year 1901 a ditch theretofore constructed along the west side of the dedicated portion of Alabama street and probably across the alley was extended south to and across Silver street. This was done by men employed by the street commissioner of the city and at the expense of the city, the purpose being to divert the surface water which tended to follow the natural slope of the country

toward Missoula Gulch on the east and prevent it from cutting up the surface of the roadway toward the south and obstructing travel in that direction. At that time there were two lines of travel well defined, one on the east side of the line of the ditch and the other west of it, the one or the other being used according as it suited the convenience of the traveler. Later culverts were constructed at the points indicated on the diagram to facilitate access to the streets and alleys toward the west. Prior to 1889 placer mining operations were extended from Missoula Gulch toward the west as far as the west line of the disputed area and north to about the south line of Mercury street, leaving the surface in such a condition, by reason of excavations and scattered debris, that travel over the area south to Silver street, though practical, was not convenient. The surface of this portion was leveled off by the city in 1905 and 1906. About the same time lines of wires were erected along the east and west sides of the disputed area, to supply the residents to the west with light and telephone service. Arc-lights were thereafter maintained by the city at Silver and Mercury streets. All of these improvements were made without the consent of the plaintiff, though its officers and agents had knowledge of them at the time. As a result, the area gradually assumed the appearance of an improved, much-traveled street. Sometime during the years subsequent to 1900 the city caused Mercury street to be graded. The grading operations stopped at the west boundary of the Barnard Placer. The disputed area has never been made to conform to the grade established for that street. Later Silver street was graded throughout. Much evidence was introduced as to the character and amount of travel over the disputed area from the time the various additions were made to the city. If, however, the testimony of defendant's witnesses be taken as uncontroverted and at its utmost worth, it does not tend to establish a definite, fixed line of travel over any part of the area prior to 1896. As late as that year there were no buildings toward the west. The area in that direction was unoccupied, and persons having occasion to travel south and west from

Galena street, after reaching the alley, took that direction which best suited their convenience and did not usually follow any definite, fixed route. Gradually, as the lots in these additions became occupied during the subsequent years, travel was forced eastward until it finally followed uniformly the two lines parallel with the line of the ditch. This had been the condition only from a date not earlier than the year 1896. The date at which the ditch was constructed was fixed by the defendant's one witness who testified on the subject as in the summer of 1901—in June or July. The construction work occupied two or three days. One of plaintiff's witnesses, who was assistant city engineer from 1898 to 1906 and city engineer during 1908 and 1909 and was familiar with the streets of the city, stated that the ditch was not constructed until 1907 or 1908. These were the only witnesses who undertook to fix a definite date at which the city authorities assumed to exercise control over the disputed area.

The district court did not make special findings, but found generally for the defendant. It proceeded upon one of two theories, *viz.*: That the assumption of jurisdiction by the city authorities by the doing of this work was definitely shown by the first witness to have taken place more than ten years prior to the commencement of the action, and hence that the right by prescription had then already accrued; or that it was wholly immaterial when the city authorities assumed jurisdiction and that a mere user by the public for the statutory period of ten years was sufficient to establish the right. Without considering [1,2] the testimony introduced by the plaintiff as to when the work was done, it seems clear that the defendant's evidence does not warrant any finding other than that it was commenced and finished during the last three days of July, 1901. Since the defendant relied exclusively upon a right acquired by adverse use, it assumed the burden of establishing this right, by showing every element necessary to constitute its title. (1 Cyc. 1143.) One of these elements was to fix, by direct or circumstantial evidence, a definite date at which the statute began

to run. The statement of the witness left the court no basis for a conclusion as to any definite date within the extreme limits covered by the two months mentioned. It is clear, therefore, that the only conclusion the court could reach was that the work was not done until the last two or three days of July, because there was no basis for fixing any earlier time. The statute was, upon this theory, not put in motion earlier than July 28, 1901.

This brings us to the question whether mere user by the public for the statutory period, without substantial recognition by [3] the public authorities, is sufficient to establish a highway by prescription. The answer to this inquiry must, we think, be found by reference to the provisions contained in sections 1337 and 1340 of the Revised Codes. These are the following: "All highways, roads, streets, alleys, courts, places and bridges laid out or erected by the public or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways." (Sec. 1337.) "A highway laid out and worked and used as provided in this Act must not be vacated or cease to be a highway until so ordered by the board of county commissioners of the county in which said road may be located; and no route of travel used by one or more persons over another's land shall hereafter become a public road or byway [highway?] by use, or until so declared by the board of county commissioners, or by dedication by the owner of the land affected." (Sec. 1340.) These provisions were first enacted as sections 2600 and 2603 of the Political Code of 1895. Whatever may have been the rule touching the establishment of public highways by prescription prior to the date of their adoption, they declared what should be considered highways at the time of their enactment and how a highway might thereafter be established. By the first section all highways, roads, streets, alleys, *etc.*, were declared public highways (1) which had been laid out or erected by the public (that is, by the public authorities and at public expense); (2) which were then traveled or used by the public; or (3) which had been laid out or erected

by others (by private persons) and dedicated or abandoned to the public. We are not now concerned with the question [4] whether it was the intention of the legislature to declare all roads then in use to be public highways, without reference to how long the use had continued or what the character of use had been. We think, however, as we said in *State v. Auchard*, 22 Mont. 14, 55 Pac. 361, that the intention was to declare those only to be public highways which had been established by the public authorities, or were recognized by them and used generally by the public, or which had become such by prescription or adverse use at the time the provision was enacted. Any other view would, in our opinion, render the legislation open to serious constitutional objection (Const., sec. 14, Art. III). Be [5] this as it may, the second section clearly evinces the intention that no highway falling within the enumeration contained in the former section should be vacated except by the public authorities, and that no route of travel should thereafter become a public right until declared so by the public authorities or had been made so by dedication by the owner of the land affected. The term "now," as used in the first provision, clearly indicates the intention to leave intact such rights as the public had already acquired, and as clearly does the use of the term "hereafter," in the latter section, indicate an intention that rights of the same kind should not in the future be acquired except by the methods therein prescribed. The expression, "one or more persons," can mean no more nor less than any number of persons, and therefore is necessarily as broad in its meaning as the term "public," employed to indicate the extent of the use mentioned in the first section. By these enactments the legislature explicitly declared it to be the rule that after July 1, 1895, when the Codes went into effect, a highway could not be established by use unless the use should be accompanied by some action on the part of the public authorities having jurisdiction of the subject, tantamount to a declaration that the particular road was a public highway. The provisions were copied substantially from the Political Code of California, where they appear

as sections 2618 and 2621. We have not been referred to any decision by the supreme court of that state, construing the latter section. In *Leverone v. Weakley*, 155 Cal. 395, 101 Pac. 304, cited by counsel, it was merely referred to as not in anywise in conflict with the theory that a highway may be established by an implied dedication of it by the owner of the land affected by it. No question of dedication is involved in this case. In North Dakota a statute containing the provision, "no road traveled or used by any one or more persons over another's land shall become a public highway by use." The supreme court of that state construed it as meaning that no highway could be established by prescription after its enactment, unless the right had theretofore fully matured by lapse of time. (*Walcott Township v. Skauge*, 6 N. D. 382, 71 N. W. 544; *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082.) It will be noted, however, that the Dakota statute does not contain the clause found in our statute, viz.: "Until so declared by the board of county commissioners, or by dedication by the owner of the land affected"; hence we are not required to adopt *in toto* the construction given by the court to the Dakota statute, our own evidently meaning that use, coupled with a substantial recognition of its public character by the public authorities, is sufficient to put the statute in motion.

But counsel insist that under other provisions of the Code, the control of streets and other highways within the limits of a city or town is lodged exclusively in the city or town authorities, and hence that section 1340 has no application to this case. This argument proceeds upon the assumption that mention in this section of the board of county commissioners, which body has control of county roads only, excludes the notion that the legislature intended that the provision should apply to streets in cities and towns. That the streets of these municipalities are subject to the control of the municipal authorities is true (sec. 3259, Rev. Codes). That the provision in question does not in terms refer to them is also true. But, taking sections 1337 and 1340 together, a legislative intention is clearly evinced

to provide a general rule by which highways of every character may be established or vacated. The latter section has reference to those highways enumerated in the former, to streets, etc., as well as to county roads; and though the only public authority mentioned is the board of county commissioners, it cannot be conceived that the legislature by this reference alone intended that this board should thereafter have control of the streets of cities and towns, or that these should be established by methods other than those prescribed for the establishment of county roads.

Counsel also insist that the cases of *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203, 565, and *Lockey v. City of Bozeman*, 42 Mont. 387, 113 Pac. 286, have definitely established the rule applicable to the condition of facts presented in this case, and that it is conclusive against the position assumed by the plaintiff. Each of these cases, however, involved rights which had been established and matured prior to the enactment of the provision in question here. No reference was made in either of these cases to the provision found in section 1340, *supra*, nor was it cited or commented upon by counsel. The case of *State v. Auchard, supra*, also involved a right which was alleged to have become matured prior to July 1, 1895. In the case at bar for the first time has the provision been invoked, rendering a determination of its meaning and application necessary. Neither was it referred to in the case of *Montana Ore Purchasing Co. v. Butte & B. etc. Min. Co.*, 25 Mont. 427, 65 Pac. 420. That case was decided upon the controversy as presented by counsel. If the provisions of the statute had been invoked by the defendant, it would have been a conclusive answer to the plaintiff's contention, irrespective of the question actually decided.

During the oral argument counsel for plaintiff suggested that the answer is wholly insufficient to present the issue of adverse use by the public, in that it asserts title in the city to the right of way claimed. The conclusion we have reached renders it unnecessary to notice this contention. Moreover, the question involved is not discussed in the printed argument.

The decree and order are reversed and the cause is remanded to the district court for a new trial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

ON MOTION FOR REHEARING.

(Submitted November 7, 1913. Decided December 11, 1913.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In their petition for a rehearing filed by counsel for defendant in this case, it is said that the original opinion has left it uncertain whether or not the several provisions of the Revised Codes (sections 3212, 3213, 3259, 3466, 3479 and 3480), relating to the power of the authorities of incorporated cities and towns to establish, open, widen and vacate streets, are still in force. Counsel quote from the opinion the following: "But, taking sections 1337 and 1340 together, a legislative intention is clearly evinced to provide a general rule by which highways of every character may be established or vacated," and then proceed to argue that if this passage is taken literally, it implies that hereafter the streets of cities and towns will be exclusively under the control of the boards of county commissioners. The passage, read in connection with what is said elsewhere in the opinion, is not susceptible of any such interpretation. The Act of 1903, of which sections 1337 and 1340 are a part, applies to county roads only. This is made clear by reference to its title. The same may be said of the chapter of the Political Code of 1895 from which these sections were taken. While this is true, we think the legislature, in declaring that travel by one or more persons over a given route outside of an incorporated city or town is not in itself, in the absence of an assumption of jurisdiction by the board of county commissioners by some definite action, sufficient to constitute adverse use of it as a highway, impliedly declared also that use of a street or alley within the limits

of an incorporated city or town shall not be deemed adverse until jurisdiction has been assumed by definite action by the city or town authorities; and that in either case a highway once established cannot be vacated except by an order of the public authorities having jurisdiction over it.

Rehearing denied.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

BROWN, RESPONDENT, v. FOSTER, APPELLANT.

(No. 3,369.)

(Submitted September 24, 1913. Decided October 17, 1913.)

[135 Pac. 993.]

Election Contests—Cities and Towns—Aldermen—Eligibility—Residence—Statutory Construction.

Cities and Towns—Aldermen—Eligibility—Residence—Statutory Construction.

1. *Held*, that the provision of section 3228, Revised Codes, that no person shall be eligible to any elective or appointive municipal office who has not resided in the city or town for at least two years immediately preceding his election or appointment, applies to officers (aldermen in the instant case) elected at the first election after the incorporation of a town.

Statutory Construction.

2. Articles of the same Chapter of the Codes, when dealing with the same subject and not in conflict with each other, must be construed together.

Same.

3. Under subdivision 3, section 3562, Revised Codes, the division of the Codes into Parts, Titles, Chapters, Articles and Sections, is a mere device for convenience, and no implication or presumption of a legislative construction is to be drawn therefrom.

Appeal from District Court, Park County; Albert P. Stark, Judge.

ELECTION CONTEST by W. E. Brown against Victor W. Foster. Judgment for the contestant, and the contestee appeals. **Affirmed.**

Messrs. Miller & O'Connor, for Appellant, submitted a brief; *Mr. Jas. F. O'Connor* argued the cause orally.

Messrs. John T. Smith & Son, and *Mr. Fred. L. Gibson*, submitted a brief in behalf of Respondent; *Mr. Gibson* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Victor M. Foster having been declared elected alderman from the second ward of Clyde Park, this proceeding was instituted to contest his right to the office upon the ground that at the time of the election he had not been a resident of the town of Clyde Park, or of the second ward thereof, or of the territory embraced within either for two years immediately preceding his election. Upon the trial the court found these charges to be sustained and concluded that the contestee was ineligible to the office. A judgment was rendered and entered ousting him and canceling his certificate of election. From that judgment this appeal is prosecuted.

The election was the first after the incorporation of the town of Clyde Park, and this appeal raises but a single question, *viz.*: Does section 3228, Revised Codes, apply to officers elected at such an election? The section reads as follows: "No person is eligible to any municipal office, elective or appointive, who is not a citizen of the United States, and who has not resided in the town or city for at least two years immediately preceding his election or appointment, and is not a qualified elector thereof."

The history of a statute frequently furnishes the very best key to its interpretation. Prior to 1887 there were not any general municipal laws in the territory of Montana. Cities were incorporated and governed by special Acts, and the provisions of these several special statutes were not at all harmonious. In one city the qualifications of an alderman were much more exacting than in another. In an Act entitled "An Act relating to the

formation of municipal corporations," approved March 10, 1887, is to be found our first general Municipal Act. It was comprehensive and covered the subject of municipal organization and control thoroughly. It was incorporated in the Compiled Statutes of 1887 as Chapter 22, Fifth Division, General Laws, sections 315-440. The Act provided for the incorporation of cities and towns, for the annexation of additional territory, for municipal elections, enumerated the officers of towns and of cities of the different classes, and defined the duties of each. Section 364 prescribed the qualifications of the mayor, and section 365 the qualifications of an alderman. In each there was the provision that he must be a taxpaying freeholder. By an Act of the fifteenth extra session, approved September 14, 1887, these two sections were amended by omitting the "freeholder" requirement. Other amendments to the Act were made in 1889 and 1893. When the Code Commissioners submitted to the legislature the drafts of the proposed Codes, they accompanied them with a brief report giving something of the history of the different provisions in a general way. Speaking of the laws for the government of counties, cities, and towns (secs. 4100-5133, Political Code), the commissioners said, "Existing statutes have been followed as far as practicable"; and a comparison of the Municipal Act of 1887, as amended, with the draft of the Municipal Code as submitted, discloses that the commissioners had found it practicable to use most of the existing statutes. Many of these sections are copied *verbatim*, while the general framework of the Act of 1887 is preserved. However, in lieu of sections 364 and 365, above, prescribing, respectively, the qualifications of mayor and alderman, the Code Commissioners substituted a single section (section 4752, Political Code, now section 3228, Revised Codes, above) fixing the qualifications of all municipal officers, whether elected or appointed. The Political Code was passed and approved substantially in the form in which it was submitted, and no change whatever was made in section 4752. On March 7, 1895, the same legislature which had theretofore, on February 25 of the same year, passed the Political

Code, also passed an Act entitled "An Act to amend sections 364 and 365 of the Fifth Division, Compiled Statutes of Montana, and the amendments thereto approved September 14, 1887." The effect of this amendment was to restore the provision that the mayor or alderman must be a freeholder, and those two amended sections were incorporated in the Political Code as sections 4749 and 4753, respectively.

In its plan the general Municipal Act of 1887 was a single bill having 126 sections. When codified, it was treated as one chapter (Chapter 22, Fifth Div., Comp. Stats., above). The Code Commissioners arranged their proposed Codes in Parts, Titles, Chapters, Articles, *etc.*, and their proposed municipal statutes were all under Title 3, Part 4, of the Political Code. The proposed statute upon the subject, "Organization and government of cities and towns," was found in Chapter 3, and this Chapter was subdivided into Articles. These provisions thus arranged were all adopted without substantial change. Article 1 of Chapter 3 is entitled "Proceedings for the organization of a city or town and adding contiguous territory." Article 2 is entitled "Officers and elections." The first four sections of Article 1 deal with the incorporation of cities and towns and the election of the first complement of officers. In their preparation the Code Commissioners simply borrowed sections 315, 316 and 318 of the Compiled Statutes above, with their amendments. There is not a single substantial change, even in verbiage. The remaining sections of Article 1 deal with additions and are substantially copied from sections 319, 321, and 322 of the Compiled Statutes. In the remaining Articles of Chapter 3 the commissioners departed somewhat more generally from the Municipal Act of 1887 with its amendments, but covered every subject in the same general way.

The Municipal Act of 1887 was a comprehensive whole. Its language throughout forbids the assertion that the qualifications prescribed for mayor and alderman did not apply to those chosen at a first election after incorporation, as well as to like officers chosen at subsequent elections. Throughout all the amendments

made to that Act the same general unity of plan was preserved. In borrowing from it so liberally it would seem that the Code Commissioners and the legislature of 1895 must have had in mind the same purpose as the legislature of 1887, *viz.*, a comprehensive Code of Laws applicable to a municipal corporation from its organization and dealing with its formation, its officers and agents, its powers and its duties. Section 4752, as reported by the Code Commissioners, was retained, but apparently the legislature was not fully satisfied with it and amended sections 364 and 365; and, by thus restoring to the law the provision that the mayor or alderman must be a taxpaying freeholder, the legislature evinced its purpose again to preserve, as far as practicable, the plan and the provisions of the Municipal Act of 1887.

Counsel for appellant contend, however, that, since section 3228 is found in Article 2 of Chapter 3, it ought not to be construed as applicable to officers whose election is provided for in Article 1 of that Chapter. They insist that "these two Articles are absolutely independent of each other." But, if they are independent of each other for any purpose, they are for all purposes, and counsel's argument pursued to its legitimate conclusion, if adopted, would lead to this result: That between a first election after incorporation and the next annual municipal election the newly incorporated city or town would have a full quota of officers, but they would be without authority to act and could not receive any salaries or other compensation, for the provisions for salaries are found in Article 2, while the statutory delegation of powers is found in other Articles of Chapter 3. This absurd conclusion only emphasizes the fallacy of the argument and serves to impress the idea that the entire Municipal Code, comprising all of Title 3 (sections 3202-3549), is to be treated as one statute whose provisions are interdependent.

But appellant's position is untenable for another reason. In the absence of any statutory rule we would be required to construe the two Articles together, if possible, for they are [2] both of the same Chapter, which deals with one subject.

(*Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29.) This, however, is the rule of construction provided by the Codes for their own interpretation. (Sec. 3554, Rev. Codes.) There is not any conflict between Article 2 which prescribes the qualifications of an alderman, and Article 1 which does not, and therefore the rule of section 3557, Revised Codes, has no application. It is only in case of conflicting provisions that the rule which requires one Article to be treated independently of another can be invoked. The division of the Codes into Parts, Titles, Chapters, Articles, and sections is a mere device for convenience, and no implication or presumption of a legislative construction is to be drawn therefrom. (Subd. 3, sec. 3562, Rev. Codes.)

From its legislative history and its obvious meaning, when viewed in the light of the elementary rules of construction, our conclusion is that section 3228, above, is of general application in the Municipal Code and controls aldermanic candidates who aspire to office at a first election after incorporation, as well as to those who seek like honors at subsequent elections, and that the trial court's conclusion from the undisputed facts is correct.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

WESTLAKE, APPELLANT, v. KEATING GOLD MINING CO.
ET AL., RESPONDENTS.

(No. 3,276.)

(Submitted September 19, 1913. Decided October 18, 1913.)

[136 Pac. 38.]

*Personal Injuries—Master and Servant—Mines and Mining—
Violation of Statute—Negligence Per Se—Causal Connection
Between Negligence and Injury—Safe Place to Work—Ex-
plosives—Appliances—Negligent Use—Expert Testimony—
Assumption of Risk.*

Personal Injuries—Negligence—Pleading and Proof.

1. Plaintiff in a personal injury action need not prove negligence in all the particulars charged in his complaint, evidence tending to establish negligence in any of the particulars alleged being sufficient to take the case to the jury.

Same—Master and Servant—Violation of Statute—Negligence Per Se.

2. The violation of a specific duty imposed by statute, such as the storing of dynamite in a mine in quantity greater than 3,000 pounds (Rev. Codes, sec. 8546), or storing it at a place therein where, should it accidentally explode, escape by the mine workmen would be cut off, is negligence *per se*.

[As to duty of mine owners to prevent injury to their employees, see note in 87 Am. St. Rep. 557. As to assumption of risk on failure of employer to perform statutory duty, see note in Ann. Cas. 1913C, 210. As to liability of mine owner to employee for injuries from premature explosion, see note in Ann. Cas. 1913C, 954. As to liability of mine owner for injuries caused by falling of roof of mine, see note in Ann. Cas. 1912B, 577.]

Same—Evidence—Negligence—Causal Connection With Injury.

3. The requirement of the rule that, before negligence can become a basis of recovery for personal injuries, a causal connection must be shown between it and them, *held* to have been satisfied by the showing of plaintiff, who sought damages sustained by reason of an explosion of a quantity of dynamite stored in a mine contrary to statutory provision, to the effect that an excessive quantity was kept in the mine, that it exploded and that he was injured.

Same—Absence of Causal Connection.

4. Plaintiff who, at the time of the explosion of a quantity of dynamite stored at a place in a mine contrary to the provisions of section 8546, Revised Codes, was not so situated as to have his escape from the mine cut off by it, could not charge as an act of negligence the storage of the powder in a place where, in case of accidental discharge, escape by those working in the mine would be cut off, since the causal connection between his injuries and the stoppage of egress from the mine would be lacking.

Same—Safe Place to Work—Complaint—Sufficiency.

5. The allegation that defendant mining company had negligently stored dynamite at a place where, should an explosion occur, the lives

of persons working in the mine would be imperiled, *held*, the equivalent of a charge of negligence on part of the master in failing to furnish his employee a reasonably safe place in which to work.

Same—Explosives—Appliances—Negligent Method—Evidence—Sufficiency.

6. Evidence *held* sufficient to justify submission to the jury of the question whether or not defendant had, in the selection of electricity for thawing dynamite, adopted a reasonably safe method, as well as to sustain the charge of negligence based on the overheating of the explosives through the means employed.

Same—Dynamite—Cause of Explosion—Expert Testimony—Admissibility.

7. Evidence sought to be elicited from miners who, though not claiming any precise knowledge of the constituents of dynamite had handled it and knew its properties from a practical point of view, tending to show that the bursting of an electric light bulb may bring about an explosion of dynamite being thawed in a box by means of incandescent electric lights, was admissible.

Same—Appliances Used Elsewhere—Evidence Inadmissible, When.

8. Where the charge of negligence on the part of defendant mine owner was based, not upon the use of electricity in thawing dynamite but upon the manner and extent in which it was employed, evidence that it was not elsewhere resorted to as a thawing agency was properly excluded.

Same—Safety of Appliance—Expert Testimony—Admissibility.

9. The question whether the use of electricity for thawing dynamite as employed by defendant was a safe one was properly one for expert testimony.

Same—Motion to Strike Testimony—When Refusal not Error.

10. Refusal of motion to strike all of certain testimony, parts of which only were inadmissible, was not error.

Same—Assumption of Risk.

11. Under the rule that to make out a case of assumption of risk the injured party must have known of and appreciated the danger from which he suffered, *held* that plaintiff assumed the risk of all dangers incident to the dynamite stored in the mine as he saw them, and not those due to a negligent method of thawing pursued out of his sight and with which he had nothing to do.

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

ACTION by Alexander Westlake against the Keating Gold Mining Company and another. Plaintiff appeals from the judgment of nonsuit. Reversed and remanded for retrial.

Messrs. Walsh & Nolan, for Appellant, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

The evidence showed that at the time of the explosion there was a quantity in excess of 4,000 pounds of dynamite on this level stored near the shaft and in the thawer in plain violation of this statute. This in itself constituted negligence. (*Cameron*

v. *Kenyon-Connell Com. Co.*, 22 Mont. 312, 74 Am. St. Rep. 602, 44 L. R. A. 508, 56 Pac. 358; *Neary v. Northern Pac. R. Co.*, 41 Mont. 480, 110 Pac. 226; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189, 100 Pac. 971; *Denver Omnibus & Cab Co. v. Mills*, 21 Colo. App. 582, 122 Pac. 798.)

It is alleged that dynamite was negligently stored, kept and thawed in the mine where mining operations were carried on, at a point in the mine about seventy-five feet from the incline shaft, where, should an explosion of same occur, means of escape would be cut off, and where, should an explosion occur, the lives of the employees would be imperiled. This charge necessarily involved the proposition as to whether or not a reasonably safe place was provided. The proof shows that the explosive properties of dynamite are greatly increased when heated; that dynamite heated to the extent to which it was in this case was likely to be exploded by a jar. While it is true that no work was done on the level where the dynamite was stored and thawed, the level had connection with the shaft which was constantly in use, and this was the shaft through which the men were taken to and from their work, and was likewise the shaft where the appellant was working at the time he sustained the injury. With the possibility of an explosion at any time, or rather with the probability of an explosion at any time, the installation of this thawer at the place where it was used constituted a flagrant disregard of the safety of the men who had occasion to use the shaft. (*O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724.)

We suppose the nonsuit was granted because, as contended by the respondents, it was largely a matter of speculation as to what caused the explosion to occur. Even though the cause was largely a matter of speculation, the granting of the motion was wrongful for, as already stated, the other grounds, the failure to provide a safe place and the storage of powder in excess of 3,000 pounds, were in the controversy. We insist, however, that even as to this ground, the proof was such as to warrant its sub-

mission to the jury. True, our view of the evidence as to the cause of the explosion is a theory, but it is a theory which the existing facts authorize and sustain. It is said that other theories as to the cause of the explosion might likewise be advanced. Suffice it to say that they were not advanced, and even if they were, it would be a question for the jury to say whether they were tenable or not in the light of the facts. Respondents insist, however, that the appellant must show what actually did cause the explosion. We insist that proof to that extent is not required. (See *Luengene v. Consumers' Light, H. & P. Co.*, 86 Kan. 866, 122 Pac. 1032; *O'Brien v. Corra-Rock Island Min. Co.*, *supra*.)

On the facts disclosed by the record, the explosion itself made out a *prima facie* case of negligence. (*Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29.)

The evidence shows that Westlake, Ryan, the shift boss, and Russell, the skip-tender, were in the shaft above the level where the dynamite was, repairing the track, and below them and above the level two other men. So far as the record discloses, at the time of the accident the two men were inactive and were waiting until the work being done by Ryan and his associates was finished. These were the only persons who were in the immediate neighborhood of the dynamite, and on the level itself there is no evidence to show the presence there of anybody. The employee who attended to the thawer was, at the time of the accident, in a lower level where his body was afterward found. The powder exploding under these circumstances renders applicable the doctrine of *res ipsa loquitur*. (*Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146, 29 L. R. A. 718, 40 Pac. 1020; *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89, 56 L. Ed. 680, 32 Sup. Ct. Rep. 399; *Kearner v. Charles S. Taner Co.*, 31 R. I. 203, 29 L. R. A. (n. s.) 537, 76 Atl. 833.) The simple fact that the relation of master and servant existed does not prevent the invocation of this doctrine. (*Hardesty v. Lumber Co.*, *supra*; *Byers v. Carnegie Steel Co.*, 159 Fed. 347, 86 C. C. A. 347.)

It is asserted that the appellant in this case assumed the risk. The appellant was a timberman and worked far removed from the men in the level where this thawer was installed. He visited the thawer once for a few moments for the purpose of getting some powder, and at that time the powder, as to heat, was all right. In the case of assumption of risk there must exist the elements of knowledge and an appreciation of the danger. (*O'Brien v. Corra-Rock Island Min. Co.*, *supra*; *Osterholm v. Boston & Mont. etc. Min. Co.*, 40 Mont. 508, 107 Pac. 499; *Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 Pac. 142; *Anderson v. Northern Pac. Ry. Co.*, 34 Mont. 181, 85 Pac. 884.)

Mr. Jesse B. Roote, and *Mr. J. E. Healy*, for Respondents, submitted a brief and argued the cause orally.

There is no showing in pleading or in evidence that the excessive quantity of powder had anything to do with the explosion; there is neither pleading nor evidence that it cut off anyone's escape, or in any way caused injury, either to plaintiff or anyone else. The rule laid down in the case of *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243, is clearly applicable here. (See, also, Thompson on Negligence, sec. 45; Labatt on Master and Servant, 803, notes 4, 5.)

There is, we insist, no pleading of the doctrine of a safe place, and it is not in this case. But if it were there is no showing in pleading or in evidence which justifies anything being said or intimated that such was not furnished, and even the claim of excessive quantity of powder does not reach it, as there was and is no showing that the excess has anything to do with the place or the cause of the explosion. The *O'Brien v. Corra Rock Island Case* has no bearing here, for in that case ore was being stoped by blasting, with the accompanying vibration of machine drills right up against, and in forty feet of, a powder magazine, caps being kept with the powder. (40 Mont. 212, 105 Pac. 724.)

The utter inapplicability of the cases of *Judson v. Giant*

Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146, 29 L. R. A. 718, 40 Pac. 1020, *Kearner v. Chas. S. Tanner Co.*, 31 R. I. 203, 29 L. R. A. (n. s.) 537, 76 Atl. 833, *San Juan v. Requena*, 224 U. S. 89, 56 L. Ed. 680, 32 Sup. Ct. Rep. 399, and similar cases, as bearing upon the doctrine of a safe place or upon that of *res ipsa loquitur*, as applied to master and servant cases, is apparent. This court cannot say from the pleadings or evidence herein that the sole cause of explosion can be traced home to the defendants, to the exclusion of all other reasonable hypotheses.

The doctrine of *res ipsa loquitur* is not applicable here, and is not, according to the weight of authority, applicable to master and servant cases, in any event. (1 Dresser on Employers' Liability, sec. 50; *Northern Pac. R. Co. v. Dixon*, 139 Fed. 737, 71 C. C. A. 555, and cases cited; *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838; *Dalton v. Selah Water Users' Assn.*, 67 Wash. 589, 122 Pac. 4; *Reino v. Montana Min. Land Dev. Co.*, 38 Mont. 291, 99 Pac. 853; *White v. Spreckels*, 10 Cal. App. 287, 101 Pac. 920; *Christiansen v. Oregon S. L. Ry. Co.*, 35 Utah, 137, 18 Ann. Cas. 1159, 20 L. R. A. (n. s.) 255, 99 Pac. 676; *De Yoe v. Seattle Electric Co.*, 53 Wash. 588, 102 Pac. 446, 104 Pac. 647, 1133.)

The case of *Byers v. Carnegie Co.*, relied on by appellant, does not involve this doctrine, for there the only question involved was as to a defective appliance, to the condition of which, by the exclusion of other causes, the injury and its cause were traced, to-wit, a defective valve. Nor does the *Hardesty Case*, in this state, show any different doctrine; there the cause was traced to the defects in piling the lumber, without straps or binders, and this was affirmatively shown to be the direct, efficient and proximate cause of injury. (*Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Olsen v. Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 731; *McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40; *Quinn v. Utah Gas etc. Co. (Utah)*, 129 Pac. 362; *Lochhead v. Jensen (Utah)*, 129 Pac. 347; *Sowers v. McManus*, 214 Pa. 244, 63 Atl. 601; *Bishop v. Brown*, 14 Colo. App. 535, 61 Pac. 50; *John Morris Co. v. Southworth*, 154 Ill. 118, 39 N. E.

1099; *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394; *Loses v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Huff v. Austin*, 46 Ohio St. 386, 15 Am. St. Rep. 613, 21 N. E. 864; *Veith v. Hope Salt etc. Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410; *Illinois Central Ry. Co. v. Phillips*, 49 Ill. 234; *Kleebauer v. Western Fuse etc. Co.*, 138 Cal. 497, 94 Am. St. Rep. 62, 60 L. R. A. 377, 71 Pac. 617; *Denver etc. R. Co. v. McComas*, 7 Colo. App. 121, 42 Pac. 676.)

MR. JUSTICE SANNER delivered the opinion of the court.

Action by appellant to recover damages for personal injuries caused by an explosion of dynamite in a mine of the respondent company on January 18, 1911. Nonsuited upon the trial, he appeals from the judgment. The allegations of the complaint touching the cause and manner of the accident are as follows: "That on the 18th day of January, 1911, and for some time prior thereto, the defendants negligently stored and kept and thawed in said mine, where said mining operations were carried on, large quantities of dynamite and other highly explosive substances, and, as plaintiff is informed and believes, largely in ----- 3,000 pounds, and at a point in said mine about seventy- from said incline shaft, and at said shaft where, in its d course, it reached the 200-foot level, and where, should sion of same occur, escape by those working in said the employ of the defendant company using said in- ft as a means of egress, would be cut off, and where, explosion of said dynamite occur, the lives of the said s of said defendant company, working in said mine and incline shaft, would be imperiled; * * * that the adants so storing and keeping said dynamite and other plosive substances, as aforesaid, and at the place desig- giligently placed a portion of same in a tight compart- storage preparatory to use, and, for the purpose of the same and the said dynamite and other explosive s so placed in said compartment for the purpose of wed, the defendants negligently used and caused to be

used electricity to such an extent that said dynamite and other highly explosive substances so being thawed, as aforesaid, were heated to excess; and plaintiff further avers that the use of electricity for the purpose named, as a thawing agency and in the manner stated and at the place named and to the extent used, was highly dangerous—all of which facts the defendants knew, or, in the exercise of reasonable diligence, could have known; and plaintiff avers that the use of electricity in the manner in which the same was used there by defendants for the thawing of said dynamite was gross and wanton negligence on their part; * * * that on the 18th day of January, 1911, said dynamite and other explosives so being thawed, as aforesaid, and through and by reason of electricity being used for thawing the same, and by reason of said dynamite so being thawed being heated to excess through the use of said electricity in the manner in which it was, exploded, and through the explosion of same all of the dynamite so stored in said mine, as aforesaid, exploded, and through the explosion of said dynamite and other explosives, as aforesaid, and by reason of the force of such explosion, said plaintiff so working in said incline shaft received injuries," *etc.*

No special difficulty is presented in the dissection of these allegations; and, for the purpose of determining what proof was admissible under them, and whether a sufficient case was made to go to the jury, we say they fairly and sufficiently allege that the appellant's injuries, occasioned by the explosion, were due to the negligence of respondents in the following particulars: In having more than 3,000 pounds of explosives in the mine; in having explosives stored at a place in the mine where, should they explode, escape by those in the mine would be cut off; in having explosives stored at and near the shaft where, should they explode, the lives of the persons working in the shaft would be imperiled; and in the method used for "thawing," to-wit, the use of electricity in such a manner and to such a degree that the portion of the explosives being thawed became heated to excess. So construing the complaint, we proceed to ascertain the value of the case made, having in mind the rule that the appellant

[1] was not required to prove negligence in all the particulars alleged (*Beeler v. Butte & London Dev. Co.*, 41 Mont. 465, 110 Pac. 528), but that it was sufficient to take the case to the jury if the evidence presented in this behalf tended to establish that negligence in any of these particulars caused his injuries. (*Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988.)

The allegation of negligence in storing more than 3,000 [2] pounds of explosives in the mine charges the violation of a specific duty imposed by section 8546, Revised Codes, and such a violation is negligence *per se*. (*Conway v. Monidah Trust*, 47 Mont. 269, 132 Pac. 26; *Melville v. Butte-Balaklava C. Co.*, 47 Mont. 1, 130 Pac. 441; *Neary v. Northern Pac. R. Co.*, 41 Mont. 480, 110 Pac. 226; *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.) The respondents, insisting that the presence of negligence *per se* is of no importance unless it was a proximate cause of the injury, call our special attention to the case of *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. Rep. 858, and assert that "there is no showing in pleading or in evidence that the excessive quantity of powder had anything to do with the explosion." It is a rule so fundamental as to be axiomatic, [3] to which the *McWhirter Case* adds nothing, that before negligence, however established, can become a basis of recovery, causal connection must be shown between it and the injury complained of. This court has so held on several occasions, including that of *Monson v. La France Copper Co.*, *supra*, which we are assured is decisive against the appellant. The *Monson Case* aptly expresses the rule, and as aptly indicates the limit of its application. That action was for the death of a miner who, it was alleged, had fallen from a cage in the defendant's mine because of the operation of the cage without the gates required by statute—a clear charge of negligence *per se*. In the course of the decision this court, speaking through the Chief Justice, said: "We find the neglect of duty on the part of the defendant and the death of the deceased established beyond question, * * * but no fact or circumstance appears from which any reasonable

conclusion may be drawn that this neglect of duty bears a direct, proximate, causal relation to the death of deceased. There is no direct evidence that the deceased got into the cage at the 1,400-foot level, but, assuming that this fact is established, * * * there is no evidence as to how the deceased got out of the cage; * * * there is nothing to show whether he died from natural causes, or from the violence of a fall, or from being squeezed by the cage as it passed the timbers." How wide the divergence is between the situation thus disclosed and that at bar is manifest. Here it is established that the dynamite which was being kept in the Keating mine—whether more or less than the law allows—exploded and produced appellant's injuries. When a quantity of dynamite by exploding produces injury, there is a causal connection between the dynamite and the injury; and if the existence of that quantity in that place is negligence, a causal connection is made by the explosion between that negligence and the injury. It does not answer to say that a quantity of dynamite less than 3,000 pounds may or would have exploded under the same circumstances, or that the explosion of a quantity less than 3,000 pounds, under the same circumstances, may or would have produced the same injury. To suppose that a specific causal connection must be shown between the injury and the existence or explosion of that portion of the dynamite which exceeded 3,000 pounds would entirely defeat the statute, considered as a foundation of civil liability. The appellant's injuries were caused by the explosion of a quantity of dynamite kept in respondents' mine, which it is claimed was greater than that allowed by law; this, if true, was sufficient; for "where the cause of an injury is specifically ascertained, the law will not stop to speculate upon what might have occurred had such cause been absent." (Thompson on Negligence, secs. 45, 49.) Whether at the time the explosion occurred there were to exceed 3,000 pounds in the mine is a matter about which men may differ upon reading the record; but, having in view the rule that upon a motion for nonsuit the evidence must be taken in its most favorable light, and to establish whatever it fairly tends to prove,

it is deducible from the testimony that such was the fact. Hence, upon this aspect of the case, a sufficient showing was made to take it to the jury.

The allegation of negligence in storing the dynamite at a place in the mine where, should it accidentally explode, escape by those working in the mine would be cut off, also charges the violation of a specific duty imposed by section 8546, Revised Codes. Such [4] a violation is negligence *per se*; but it is obviously of such a character that no causal relation can exist between it and any injuries save those suffered by persons whose escape had in fact been cut off by the explosion. The appellant was not one of these; he was above the place of storage, above the point of explosion, and his means of egress were in no wise affected by it. The lack of causal connection between his injuries and the place of storage—considered as a potential danger, by stopping egress in case of explosion—is perfectly clear.

But the place of storage presents another aspect under the allegation of negligence in storing the dynamite at a place where, [5] should an explosion occur, the lives of persons working in the shaft, among whom was the appellant, would be imperiled. As to this he invokes the doctrine that the master is obliged to use reasonable care to furnish his employee with a reasonably safe place in which to work, the respondents insisting that the complaint does not charge a violation of that duty, and that "the doctrine of a safe place is not in the case." While it is true that the words customarily used in formulating this charge do not appear in the complaint, the language actually employed is their equivalent. In *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724, the only plea of negligence was that, at a point about forty feet from where the plaintiff was working, the defendants "had negligently and wrongfully stored and were keeping a large and dangerous quantity of dynamite,"

and killed Daniel O'Brien; but we held that measure of the master's liability was to use reasonable care to provide the servant with a reasonably safe place to work. Turning, then, to the evidence, we observe:

That the appellant was engaged in the shaft at a point about fifty feet above the 200-foot level; that a large quantity of dynamite was kept at the 200-foot level, near the shaft in which appellant was working; that it was stored at a point about seventy-five feet from the "thawer," in which dynamite was being heated so as to be rendered more readily explosive; that the dynamite both in the thawer and at the shaft, exploded; that by the explosion appellant was injured, his life imperiled, and the life of one of his companions destroyed. It is said that in point of fact there is no analogy here with the *O'Brien Case*, because caps were stored with the dynamite in that case. The difference is one of detail, not of principle. So far as we can tell, there was no exigency or custom that required the storing of the dynamite so close to the shaft that the effect of its explosion could be felt therein, or so near to the thawer as to increase the danger of explosion; and if, as may be inferred from the facts shown, the danger of explosion was increased by storing the large quantity of dynamite at a point so near the thawer, then, for the reasons stated in the *O'Brien Case*, enough was shown to take this case to the jury on the question whether the respondents had negligently failed to furnish appellant with a reasonably safe place in which to work.

The appellant also insists that, independently of the foregoing contentions, a sufficient showing was made as to the negligent cause of the explosion, under the allegations of the complaint touching the methods of thawing. According to the testimony, [6] the purpose of using a thawer is to heat cold dynamite which is not sufficiently sensitive for mining purposes, so as to make it more readily explosive. The more it is heated the more it will respond to the instrumentalities capable of inducing explosion. The thawer was a cabinet within a cabinet, situated along a drift about twenty-five or thirty yards from the shaft; the outer cabinet consisted of an excavation in the drift inclosed by a front made of scrap lumber set into the walls and floor of the drift, "put up to make a fairly close covering," and covered with gunnysacks and rags; the entrance to this outer

cabinet was through a door large enough for a person to pass through conveniently. The inner cabinet was a box 2x3 feet in size; the whole front side of it being removable. It was constructed of new lumber. Within it were four shelves made of boards, some of which were perforated, and two 32-candle power, and three 16-candle power, incandescent electric lights. In thawing the dynamite was laid upon the shelves in the inner cabinet, where the heat generated by the electric lamps brought it to or beyond the desired stage. Thawed dynamite was also kept in boxes in the outer cabinet, preparatory to distribution among the miners as needed. How much heat was generated by the means employed is not shown, and there was no thermometer or other device in the cabinet by which it could be ascertained; nor is there any testimony showing the exact degree to which dynamite should be thawed in order to be available for mining purposes and at the same time be reasonably safe, considering the nature of the substance. The record, however, is replete with testimony that it was often too hot. Some of the witnesses testified that it was sometimes so hot as to be sweaty and mushy; when in that condition it was especially sensitive and dangerous to handle. On two occasions it was so hot when delivered to the miners that they felt impelled to cool it before using, for fear of a premature explosion. Surely it was a question for the jury whether a method capable of producing such results was a reasonably safe one, or whether, as employed, it was unsafe in the respect alleged; and, as the master is obliged to use ordinary care to select such methods or appliances as are reasonably safe, having in mind the nature of the business in hand, it is clear that ample proof was made of negligence in this regard.

The respondents argue, however, that since the appellant charges the explosion to have occurred through the overheating of the dynamite, his case has failed, because there is no evidence that heat will explode dynamite, or that the thawer was generating a degree of heat sufficient to effect that result. The witness Boulware distinctly testified that the dynamite could be exploded by heat alone; "getting hot in the sun might explode

it," he said. But we do not understand the appellant to have been so limited by his complaint that he was obliged to show a spontaneous explosion from heat alone; his allegation touching the overheating of the dynamite posits a *conditio sine qua non*, which, if established by the proof and shown to be negligent, is sufficient. (*Lundeen v. Livingston E. Light Co.*, 17 Mont. 32, 41 Pac. 995; *Meisner v. City of Dillon*, 29 Mont. 116, 74 Pac. 130; *O'Brien v. Corra-Rock Island Min. Co.*, *supra*; *Stewart v. Stone & Webster E. Corp.*, 44 Mont. 160, 119 Pac. 568.) The question, therefore, is whether there was sufficient evidence that overheating of dynamite caused the explosion, either directly or as an indispensable condition. When the explosion happened, there was in operation a thawer capable of heating dynamite to excess, and dynamite was being heated in it. On the very day of the explosion, dynamite had come from this thawer overheated to the stage called "mushy." Unthawed dynamite, such as the deposit near the shaft, does not readily explode, even with cap and fuse. Dynamite thawed to the degree proper for mining purposes does not commonly explode unless cap and fuse are applied, but dynamite heated to excess may explode from heat alone. No mining operations were carried on in the drift where the thawer was. The appellant had nothing to do with its handling. No one went in or out at that level but the powderman, and he was in the level below when the explosion occurred. After the explosion there was nothing left of the thawer but scattered pieces of wood, and the rock was displaced where it had been. In the absence of a countervailing explanation, and upon the circumstances stated, it is proper to ascribe the explosion to but one source, the thawer, and to but one cause, the overheated condition of the dynamite therein.

Whether, thus overheated, the dynamite exploded spontaneously or because susceptible to some impulse otherwise inadequate, it was not necessary for the appellant to show; but it was his privilege to account for the explosion, if he could, in such a manner as to cut off all escape from liability. In his effort to accomplish this, he was met by many adverse rulings, of which

he complains. There was testimony that the bulbs in the thawer [7] were so situated, with reference to the holes in the shelves, that moisture, if generated in the cabinet, could get to them; that the dynamite was sometimes heated to such a degree as to have moisture upon the sticks; that an electric bulb, when inclosed, may get so hot as to burn wood or set clothing afire; that it can be heated by electricity so that the heat itself will break the glass, or that the glass would be broken by a drop of water striking it; that when a bulb breaks there is a report "sometimes like a 30-30 or a 32 revolver cartridge." One witness also testified that, heated to the degree it sometimes was by the thawer, dynamite will explode from a jar or concussion such as would be caused by the bursting of an electric light bulb of the same character as those used in the thawer. But other testimony to the same effect was excluded. It is true that the witnesses from whom this evidence was sought claimed no precise knowledge of the constituents of dynamite, or of the exact degree to which it must be heated to be thus responsive; but they were all practical miners who had observed and handled dynamite and knew its properties from the practical point of view. Speaking generally, and without reference to those instances in which the rulings may have been justified on strictly technical grounds, we think the testimony was competent and admissible. Whether the collapse of a bulb would suffice to explode dynamite when heated to a degree possible in the thawer, and whether a bulb might reasonably be expected to collapse under the conditions existing in the thawer, were not irrelevant inquiries; for if the collapse of a bulb was a matter to be reasonably anticipated, and if such a collapse would suffice to explode dynamite heated to a degree possible in the thawer, then it was negligence to employ a system in which these conditions might concur; and if they did concur, escape from liability would be impossible. The bursting-bulb theory may or may not be worthy of consideration under the facts as finally established; but to the extent that it might be warrantably credited by the

jury, it tended to re-enforce the contention of appellant under the allegations in question.

Appellant also sought to show by several witnesses who were miners, and who had worked in several mines besides the [8] Keating, that electricity was not elsewhere employed as a thawing agency. This evidence was rejected upon objections by respondents, their theory, as advanced in the trial court, being that the master might select any method he saw fit for the conduct of his business. Needless to say, this was incorrect; the master may select any method which is reasonably safe; and, "while not conclusive on the question of negligence, evidence is generally admissible in an action for personal injuries, to show whether or not a master's machinery, appliances, ways and methods are such as are in ordinary and common use by others in the same business." (26 Cyc. 1108; *Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; *Kinsel v. North Butte Min. Co.*, 44 Mont. 445, 120 Pac. 797.) If, therefore, the complaint had tendered the issue that the use of electricity for thawing, without regard to the manner of use, was negligence, the evidence would have been admissible. But as we read the complaint, it does not charge that it was negligence to thaw by electricity in any event, but to use electricity for thawing in the manner and to the extent employed. Under this construction, the exclusion of the evidence was proper.

In another series of questions the appellant sought to elicit the opinions of certain witnesses as to whether, having in view [9] the overheating of the powder on previous occasions, the method employed for thawing was a safe one. In some instances the witness was not sufficiently qualified, but otherwise there is no force in any of the objections addressed to these questions in the court below. The method in question was the use of electricity in the manner and to the extent employed, and the inquiry was relevant and material; for, although it may be said that, given the facts, the jury could tell whether the method was a safe one, yet it cannot be said that the jury were necessarily as competent to pronounce upon this subject as were some

of the witnesses whose opinions were rejected. (*Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42; *Copenhaver v. Northern Pac. Ry. Co.*, 42 Mont. 453, 464, 113 Pac. 467.)

Other rulings were made adverse to appellant in the course of the examination of witnesses which are assigned as error. As to them we find that whatever error was committed was cured by the subsequent admission of the testimony, and so they are of no avail on this appeal.

Some space is given in the briefs to the discussion of the ruling admitting, over objection, the testimony of Boulware before the coroner's jury, and the refusal of the court to strike it out [10] on motion. It could not be stricken in its entirety, for the very reason that it should not have been admitted in its entirety, viz., parts of it—and parts only—were admissible. The only purpose that any of it could serve was to show that at the inquest Boulware had made statements, touching the accident, at variance with those given on the trial, and such of these as it contained were admissible if denied or if recollection of them were disclaimed (Rev. Codes, sec. 8025); but the testimony of Boulware at the inquest contained much matter of opinion, and some of pure hearsay, which in no way tended to contradict the particular facts or opinions given by him upon the trial. The admission *in toto* of his testimony before the coroner's jury was wrong, but as the case did not reach the jury, we are unable to see how the appellant was prejudiced by it.

The final question is whether the case as presented by the appellant discloses assumption of risk. We think not. The only risk which it is claimed he assumed is that of the explosion [11] of the dynamite at the shaft. Whatever the condition of that dynamite may have been, and however likely the explosion from causes within his knowledge, the explosion was not according to the record, and he had no knowledge of the conditions from which it *prima facie* did proceed. To make assumption of risk it is not enough that the injured party knew of the thing from which harm might come; he must appreciate the danger from which he suffered.

(*O'Brien v. Corra Rock-Island Min. Co.*, *supra*; *Osterholm v. Boston & Mont. etc. Co.*, 40 Mont. 508, 529, 107 Pac. 499.) Paraphrasing the language of this court in *Moyse v. Northern Pac. R. Co.*, 41 Mont. 272, 108 Pac. 1062, we may say: He assumed the risk of all dangers incident to the dynamite at the shaft as he saw them; but he had no cause to think, when he went to work at the point above that the dynamite would be exploded by the negligent use of a thawer seventy-five feet away, out of his sight, and with which he had nothing to do.

The judgment is reversed and the cause is remanded for re-trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

MOSHER, RESPONDENT, v. SUTTON'S NEW THEATER CO.,
APPELLANT; J. K. HESLET, RESPONDENT.

(No. 3,277.)

(Submitted September 1913. Decided October 22, 1913.)

[137 Pac. 534.]

Master and Servant—Personal Injuries—Safe Place—Defective Appliances—Competent Fellow-servants—Intoxication—Duty of Master—Assumption of Risk—Variance—Instructions—Verdict—When not Against Law—Witnesses—Credibility—Matter for Jury.

Master and Servant—Personal Injuries—Charges of Negligence—Pleading and Proof.

1. Where the particulars in which defendant's negligence is alleged to have resulted in plaintiff's personal injuries are not pleaded as interdependent or concurring causes, plaintiff is not required to establish them all, but proof of negligence in either of the particulars mentioned is sufficient to take the case to the jury.

Same—Safe Place to Work—Burden of Proof.

2. Under a charge that plaintiff's injuries were caused by defendant's failure to furnish him with a safe place to work, in that the latter

neglected to provide a certain appliance, it was incumbent upon plaintiff to establish the fact that he was in the employ of the defendant at the time of the accident, that defendant's failure to furnish the appliance was negligence, and that because of such negligence the injuries occurred.

Same—Fellow-servants—Intoxication—Proximate Cause.

3. Evidence *held* to show that the method employed by defendant for the doing of certain work was in itself reasonably safe, and that plaintiff's injuries were primarily due, not to defendant's negligent failure to provide a certain appliance, but to the action of intoxicated fellow-servants.

[As to who is an incompetent fellow-servant, see note in Ann. Cas. 1912C, 96.]

Same—Pleading and Proof—Immaterial Variance.

4. A variance between an allegation charging negligence on the part of defendant because of failure to employ reasonably competent fellow-servants, and proof that defendant kept such servants employed knowing of their unfitness because of intoxication, *held* too unsubstantial to warrant a reversal of the judgment in plaintiff's favor, where appellant did not during trial ask for relief on the ground of surprise, and witnesses in its behalf testified fully denying intoxication.

Same—Competent Fellow-servants—Duty of Master.

5. Defendant master was obliged not only to use ordinary care to employ, but also to keep employed, competent fellow-servants—*i. e.*, to see that they did not become incompetent by reason of intoxication.

Same—Assumption of Risk—Instruction—Proper Refusal.

6. An instruction on the subject of assumption of risk which does not advise the jury that the person to be charged therewith must have appreciated and realized the danger incident to his employment, may properly be refused.

[As to the doctrine of assumption of risk in the law of master and servant, see note in 97 Am. St. Rep. 884.]

Same—Assumption of Risk—Negligence of Fellow-servants—Pleading and Proof.

7. Unless they affirmatively appear from plaintiff's own pleadings or proof, assumption of risk and negligence of fellow-servants, being matters of defense, must be pleaded to be available to defendant.

Same.

8. Where plaintiff's proof showed that, being directed to go to the assistance of a colaborer and becoming aware of the latter's intoxicated condition, he refused to assist him and was injured while making his way out of any possible danger, it may not be said that assumption of risk was made apparent by his own testimony, so as to make the defense available to defendant under the rule declared in paragraph 7, *supra*.

Same—Instructions—"Losses" or "Damages"—Harmless Error.

9. An instruction telling the jury that the employer must indemnify his employee for the "losses" caused by the former's want of ordinary care, *held* not so meaningless as to be confusing, the term "losses" evidently being used in the sense of legal damages.

Same—Verdict—When not Against Law.

10. Where negligence resulting in personal injury was charged in two particulars, only one of which was supported by the evidence, and the court instructed the jury to find for the defendant if negligence in the particular not proven had not been shown, a verdict for plaintiff, general in character, was not open to the charge that it was against law.

Same—Credibility of Witness—Province of Jury.

11. The credibility of witnesses in a personal injury action is a matter within the exclusive province of the jury; hence the contention of defendant on appeal from the judgment and order denying a new trial, that the jury should have discredited plaintiff and his witnesses and believed those of defendant, is of no avail.

Pleading and Proof—Variance—Waiver.

12. Where an action was tried in the district court on the theory that the pleadings were sufficient to admit certain proof for the purpose for which it was offered, the losing party will not be heard to assert on appeal for the first time that there was a fatal variance.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Charles W. Mosher against Sutton's New Theater Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Messrs. George F. Shelton, Fred J. Furman, and A. J. Verheyen, for Appellant, submitted a brief; Mr. Furman argued the cause orally.

The master need exercise only ordinary care to provide the servant with a reasonably safe place to work. (*Fearon v. Mullins*, 35 Mont. 232, 88 Pac. 794; *Leary v. Anaconda Copper Min. Co.*, 36 Mont. 157, 92 Pac. 477; *Longpre v. Big Blackfoot Mill. Co.*, 38 Mont. 99, 99 Pac. 131; *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Forquer v. North*, 42 Mont. 272, 112 Pac. 439; *Gregory v. Chicago etc. R. Co.*, 42 Mont. 551, 113 Pac. 1123; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.) Now, what was ordinary care to so provide such reasonably safe place in this instance? The defendant was required to exercise only ordinary care to furnish reasonably safe and suitable appliances in general use in the same kind of business; and the master is not liable because of his failure to use some attachment or special device which might have avoided the injury, if he does use ordinary care to provide the appliances which are in general use in the particular kind of business (*Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843); that is to say, this defendant is bound to do only what ordinarily prudent masters do in the same business

under the same circumstances. (*Cummings v. Reins Copper Co.*, 40 Mont. 599, 107 Pac. 904.) The rule we here invoke has been categorically stated by this court: The master is not bound to select the best appliances, nor the safest or best method for their operation. If, at the time of the selection of the particular appliance, it is generally used for the same purpose and operated in the same way, it being at the same time reasonably adapted to the purpose in hand, the master has fully discharged his duty (*Gregory v. Chicago etc. R. Co.*, 42 Mont. 551, 113 Pac. 1123); and when that duty is discharged, the master is relieved of liability. (*Masich v. American Smelting & R. Co.*, 44 Mont. 36, 118 Pac. 764.)

Even though every item of evidence introduced on behalf of the plaintiff be viewed as uncontradicted, he would nevertheless be precluded from recovery by the doctrine of assumption of risk established by the laws of Montana, and so repeatedly announced and followed by this court. The doctrine is established upon section 5243 of the Revised Codes; and, under this section, the employee is conclusively presumed to assume the ordinary risks of his employment as a part of his contract of service. (*Cummings v. Helena etc. R. Co.*, 26 Mont. 434, 68 Pac. 852; *Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619; *Thurman v. Pittsburg etc. Copper Co.*, 41 Mont. 141, 108 Pac. 588.) And the risks contemplated are by no means limited to those ordinarily incident to a servant's work which an ordinarily prudent person of the servant's experience would have discovered, according to the opinion of this court in *Leary v. Anaconda Copper Min. Co.*, 36 Mont. 157, 92 Pac. 477. The proposition that a servant, while he may assume that the master has performed his duty fully, still assumes risks that are open and obvious, is established in *Gregory v. Chicago, M. & St. P. R. Co.*, *supra*. And it is equally true that a servant assumes every risk connected with a situation the dangerous character of which he understands and appreciates. (*Fotheringill v. Washoe Copper Co.*, 43 Mont. 485, 117 Pac. 86.) Even the extraordinary risks are uniformly held to be assumed when the

servant knows of them at the time of his employment, or when he learns of them after his employment and then continues in the service after the lapse of a reasonable time in which the master may repair and remedy the defect. (*McCabe v. Montana Cent. R. Co.*, 30 Mont. 323, 76 Pac. 701.)

In the case of *Nelson v. Boston & M. etc. Min. Co.*, 35 Mont. 223, 88 Pac. 785, this court approves the following statement of the law: "Among the risks and dangers of his employment * * * were the risks and dangers arising from negligence of the fellow-servants * * * in the employment of the defendant * * * and the defendant cannot be held liable for any act or acts of negligence of fellow-servants * * * which may have resulted in the injury complained of." That is declared in the case of *McIntosh v. Jones*, 36 Mont. 467, 14 L. R. A. (n. s.) 933, 93 Pac. 557, and again in the case of *Gregory v. Chicago M. & St. P. R. Co.*, *supra*.

Messrs. Harry and William Meyer, for Respondent, submitted a brief; the latter argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The respondent, plaintiff below, brought this action to recover damages for injuries received by him as the result of a fall of some scenery at the appellant's Broadway Theater, in Butte, on December 9, 1910. The complaint is in two so-called causes of action, the first charging a failure on the part of appellant, as plaintiff's employer, to exercise reasonable care to furnish him with a reasonably safe place in which to work, and the second charging a failure on the part of appellant to use ordinary care to employ reasonably competent fellow-servants. The answer joins issue upon all the matters alleged in the complaint which form the basis of recovery, but contains no affirmative pleas. The cause was tried to a jury which returned a general verdict for the respondent, and judgment was entered thereon. Motion for new trial was made and denied. The cause is now before us upon appeal from the judgment and from the order

denying the motion for new trial. In its brief, appellant assigns forty-nine alleged errors; of these twenty-seven are argued under special heads presenting certain propositions which we shall consider in their order.

It is to be noted at the outset that although the complaint is in the form of two causes of action, but one actionable event is set forth, to-wit, a fall of the scenery resulting in plaintiff's injuries. The effect of the complaint, notwithstanding its form, [1] was to allege but one cause of action, arising out of the negligence of the appellant in the two particulars mentioned. These particulars are not pleaded as interdependent or concurring causes, as in the case of *Forsell v. Pittsburgh & M. Copper Co.*, 38 Mont. 403, 100 Pac. 218, and in fact were not such; hence the respondent was not required to establish both, but it was sufficient to take the case to the jury if the evidence presented tended to establish that negligence in either of these particulars caused his injuries. (*Westlake v. Keating Gold Min. Co.*, ante, p. 120, 136 Pac. 38; *Beeler v. Butte & London Copper Dev. Co.*, 41 Mont. 465, 110 Pac. 528; *Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988.)

1. The appellant's neglect to use reasonable care to furnish respondent with a reasonably safe place in which to work is [2] alleged to consist in these facts: that on the stage where the respondent was working "was a large amount of scenery necessary to be used and which was used" in presenting the performance then being given, "which said scenery was placed against the west wall of said building without any protection to prevent the said scenery from falling; that in order to hold said scenery and prevent same from falling, defendants in the exercise of ordinary care should have provided said stage with a stall or scenery-holder, or other proper or safe means of holding said scenery"; and because of its failure to do this, the scenery fell and injured him. Under this charge it became necessary for the respondent to maintain three propositions: that he was in the employ of the appellant at the time; that its failure to furnish means for holding the scenery was negligent;

and that because of this negligence the injuries occurred. We cannot agree that the respondent has failed to sustain any of these propositions, because, though we may be unconvinced touching his claim of employment, that was a question of fact for the jury in the first instance and for the court on motion for new trial; both the jury and the court have said upon sufficient evidence, if believed, that the respondent was in the employ of appellant at the time. We do agree, however, that [3] respondent failed in the two other necessary respects, and for these reasons: According to the evidence presented by the respondent, the Broadway Theater was "a combination-house," that is to say, a theater in which traveling companies carrying their own scenery are accommodated. In such houses the method in general use is to have a dock for all scenery not required in the production being staged, but to stack, or lean in packs, against the walls all the scenery required in the production and not actually in place upon the stage. In leaning such scenery against the wall it is pulled out at the bottom so as to give it good footing and prevent its falling. The scenery that fell upon respondent was so stacked or leaned against the wall of the theater, and it did not, and could not, fall upon him on account of that or because it was not kept in a holder. It fell upon him because other employees, while straightening the pack to the perpendicular in the effort to get out a piece from the middle, lost control of it. Quiescent, leaning against the wall, the pack was impotent for harm. Nor when being straightened was there any danger, save from incompetent handling. The reason it fell upon the respondent, as the witness Peiler stated, was that the men engaged in straightening it were drunk and did not have energy enough to hold it. The respondent himself says: "When the stage-hands are straightening up these scenery packs, to get a piece out, it does not occur very often, if a man is competent, that the scenery gets away from him and falls down on the stage. * * * As to whether I knew if it got toppled over it would fall down on the stage—well, it would not fall over if there was competent men there; there was no chance."

The inference from the foregoing is inevitable that the method employed by appellant in keeping the scenery used or to be used in the production being staged—the method in general use among play-houses of like character—was in itself reasonably safe, and that the accident was not primarily due to it but to the action of fellow-servants.

2. The failure to exercise reasonable care to furnish respondent with reasonably skillful and competent fellow-servants is alleged to have consisted in the following facts: That the appellant "carelessly and negligently employed one William Cary as a stage-hand to assist in setting up scenery and removing the same from said stage"; that he was incompetent because "at the time of his employment he was intoxicated," and thereby rendered "incompetent and unfit to perform the services required of him"; that these facts were known to appellant, or in the exercise of ordinary care should have been known to it; that "by reason of his said incompetency and unfitness, as herein detailed," said Cary performed his work so carelessly and unskillfully that a portion of the scenery was thrown upon the respondent. It is vigorously insisted by the appellant that the respondent has not sustained these allegations by the proof. The respondent's narrative of the accident and the manner of its happening is substantially this: About a quarter past 9, while talking with the stage manager, Ki Leckie, their attention was called to Cary and one Petrucci, who were over at the pack of scenery on the west or back wall of the stage. Mr. Leckie saw Petrucci beckon, and turning to respondent said: "Go over there and see what they want." Respondent went over, saw Petrucci and Cary holding the scenery pack and ascertained they were desiring to get out "a pair of curtains." Respondent then turned around, started toward the stage manager to "tell him the condition of these men"; got about ten feet from the pack when it fell upon him. "Cary was then under the influence of liquor." The witness Peiler testified that Petrucci and Cary were both handling the pack; that it fell on the respondent "because they did not have energy enough to hold it; there was no

power back of them; they were drunk''; that the condition of Cary ''was such that it could be noticed by anyone coming in contact with him,'' but the witness could not say whether Cary was intoxicated at the time he commenced work at the theater, because the witness did not see Cary come in. He had, however, seen Cary employed on the stage of the Broadway Theater, prior to the day of the accident, when Cary was intoxicated. Vic. McGrath testified to seeing Cary drink beer twice that day before the show and once during the show, half an hour before the accident. He says it was plainly noticeable at ten minutes to 8 that Cary had been drinking and was under the influence of liquor; that he had seen Leckie hire Cary for work on the Broadway stage as much as a dozen times before that, when Cary was [4] under the influence of liquor. It must be conceded that if we rigidly apply the proof to the allegations of the complaint, there is no evidence that Cary was intoxicated at the time he was hired, but he was noticeably in that condition for over an hour before the accident, during which time the appellant's stage manager was present; and this does charge the appellant with keeping him employed when he was incompetent and unfit by reason of his condition. In this situation we have no reason to doubt that the court would, on proper motion, have granted the appellant all necessary relief on the ground of surprise, if such could be fairly claimed. But in view of the fact that no claim of surprise is urged; that Petrucci, Cary and others fully testified, denying Cary's intoxicated condition at any time during the performance, we do not feel that at this time the case [5] should be reversed because of a variance so unsubstantial. It was not only the duty of appellant to use ordinary care to employ, in the first instance, but to use like care to keep employed, competent fellow-servants for respondent. If certain witnesses are to be believed, it did not do this, and the accident happened as the result. The argument of counsel for appellant that these witnesses, particularly the respondent himself, were not entitled to full credit, is quite forcible and convincing, but

that is not for us. They were believed apparently, and upon their testimony a case was made sufficient to go to the jury.

3. Under "Argument III, Errors XXI and XXII," complaint is made because the court gave instructions numbered 11 and 12, which, it is said, were "prejudicially erroneous in failing to take into consideration the assumption of risk, the negligence of a fellow-servant, and the proximate cause of the injury." Errors XXI and XXII assign the giving of instructions C and H, and we do not find that the court gave any in-
[6] structions numbered 11 and 12. The only instructions 11 and 12 that appear in the record were requests of appellant which were refused, and properly so, because they do not at all advise the jury that the person sought to be charged with assumption of risk must have appreciated and realized the danger. Instructions C and H, however, to which the argument is really directed, do omit all mention of assumption of risk, and instruction H does fail to categorically charge that the incompetency of Cary, by reason of intoxication, must have been the proximate cause of the injury. But we do not follow the argument that these instructions "should embody these elements (assumption of risk, negligence of fellow-servants, proximate cause), in order to assist the jury in determining the amount of damages," or that either instruction is wrong, "because it fails to tell the jury that in arriving at the amount of damages it must take into consideration the assumption of risk and negligence of fellow-servants." These things do not go to the amount of damages but to the utter defeat of plaintiff's entire claim. Moreover,
[7] assumption of risk, and the negligence of fellow-servants are matters of defense, unavailing if not pleaded—as they were not—unless affirmatively appearing from the plaintiff's own
[8] pleadings or proof. Some effort is made to show that assumption of risk does arise from respondent's own testimony; but it cannot be inferred from anything he said that he at any time before going over to Cary, either knew that Cary was intoxicated or appreciated any danger from that fact; on the contrary, it does appear that when he got to the pack of scenery

he then noticed Cary's condition, refused to assist on that account, and was making his way out of whatever danger there was, when the scenery fell. As to the fellow-servant doctrine, it is out of the case for the further reason that while the respondent pleads the injury to have been due to the act of a fellow-servant, it also charges that act to the negligence of appellant in furnishing a fellow-servant who was incompetent from intoxication. In passing, we add that the failure of the court in instruction H to specifically charge that the incompetency of Cary, because of intoxication, must have been the proximate cause of the injury, is entirely cured elsewhere in the charge, notably in instruction No. 10, offered by the appellant.

Instruction C is further attacked because it advises the jury [9] that the employer must in all cases indemnify his employee for the "losses" caused by the former's want of ordinary care. Taking the instructions as a whole, we think it reasonably plain that the term "losses" was used in the sense of legal damages, and that its use did not make the instruction in question so meaningless as to confuse the jury.

4. It is further urged that the verdict is contrary to law, as in defiance of instructions 5 and 6. These instructions were [10] to the effect that before the plaintiff could recover on his first cause of action, it must be established that the defendant, in the exercise of ordinary care, should have provided the stage with a stall or scenery-holder to hold the scenery, and that its failure to do so was the proximate cause of the injury. It is true, as stated above, that there was no evidence to support the allegation of negligence in this regard, but the verdict is a general one, and as there was sufficient evidence to support negligence in the other particular alleged, we cannot hold the verdict to be against the law on this account.

No argument is presented in the brief to the effect that the giving of these instructions, or the giving of any instructions based upon the so-called first cause of action, was error, and in fact the particular instructions 5 and 6 were given at the request of appellant.

5. The luminous discussion under the head "Argument VI," [11] in appellant's brief, amounts to nothing more than to a claim that the jury should have discredited the plaintiff and his witnesses and should have received as the truth of the matter the narrative of events given by the witnesses for the defendant. If the case were before us upon appeal from an order granting a motion for new trial, as in *Mullen v. City of Butte*, 37 Mont. 183, 95 Pac. 597, or from a judgment based upon an order of nonsuit, as in *Escallier v. Great Northern Ry. Co.*, 46 Mont. 238, 127 Pac. 458, the consideration urged might be pertinent. As it is, we are powerless to interfere.

The other assignments of error argued in the brief are disposed of by what we have said above. We find nothing in the record to warrant a reversal. The judgment and order appealed from are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

ON MOTION FOR REHEARING.

(Submitted November 17, 1913. Decided January 2, 1914.)

MR. JUSTICE SANNER delivered the opinion of the court.

The principal ground of the motion for rehearing is that, since the complaint alleged the failure of defendant to furnish competent fellow-servants consisted in the fact that Cary was intoxicated "at the time of his employment," a recovery was not permissible in the absence of evidence to show his intoxication at the time he was hired, notwithstanding the evidence that for over an hour prior to the accident, during which time the stage manager was present, Cary was kept employed in a noticeably intoxicated condition. We thought, and still think, the variance too unsubstantial to justify a reversal. (Rev. Codes, secs. 6585, 6593.) To this it may be added that the elaborate motions for nonsuit addressed to the trial court do not

urge either a failure of proof or a variance in regard to Cary's intoxication; that the evidence on this point was presented without objection, and that under the established rule of this jurisdiction the complaint will be treated on appeal as amended so as to make the evidence proper and effective. In other words: [12] "Where a cause is tried upon the theory that the pleadings are sufficient to admit the proof for the purpose for which it is offered, the losing party will not be heard in the appellate court for the first time to assert that there was a variance between the pleadings and the proof." (*O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724; *Galvin v. O'Gorman*, 40 Mont. 391, 396, 106 Pac. 887; *Archer v. Chicago M. & St. Paul R. Co.*, 41 Mont. 56, 71, 137 Am. St. Rep. 692, 108 Pac. 571; *Post v. Liberty*, 45 Mont. 1, 17, 121 Pac. 475; *Lackman v. Simpson*, 46 Mont. 518, 525, 129 Pac. 325; *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071.)

The motion for rehearing is denied.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

REYNOLDS, RESPONDENT, v. SMITH, APPELLANT.

(No. 3,323.)

(Submitted October 20, 1913. Decided October 23, 1913.)

[135 Pac. 1190.]

Justices of the Peace—Jurisdiction—Causes of Action—Misjoinder—Demurrer.

Justices of the Peace—Jurisdiction.

1. The jurisdiction of a justice's court is not dependent upon the amount which one might recover if he saw fit to make the demand, but upon the amount which he actually asks for; hence where plaintiff might, under section 2091, Revised Codes, have sued for \$350 because of the wrongful rescue of animals which had been trespassing upon his premises, but his demand was for only \$286, the court had jurisdiction of the cause.

Same—Causes of Action—Misjoinder—Demurrer.

2. So long as causes of action joined in one complaint are of such a character that a justice's court has jurisdiction of each of them, and the aggregate of the demands does not exceed \$300, a demurrer for misjoinder does not lie in such a court.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by Fred Reynolds against Horace Smith. From a judgment for plaintiff, defendant appeals. Affirmed.

Cause submitted on briefs of counsel.

Mr. E. O. Lewis, for Appellant.

Mr. George T. Baggs, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Action to recover \$6 damages for trespass and \$280 penalty for the wrongful rescue of fourteen head of trespassing animals. The cause originated in a justice of the peace court, was appealed to the district court, and from a judgment therein favorable to the plaintiff, the defendant has prosecuted this appeal.

1. Section 2091 of the Revised Codes provides a penalty "of not less than five nor more than twenty-five dollars for each animal" wrongfully rescued from one upon whose premises such animals are trespassing, and, since the complaint discloses that fourteen animals were rescued, it is contended that the justice of the peace court had no jurisdiction because plaintiff might have recovered \$350, the maximum penalty prescribed. Subdivision 4 of section 6286, Revised Codes, reads as follows: [1] "The justice courts have jurisdiction: * * * (4) In actions for a fine, penalty, or forfeiture, not exceeding three hundred dollars, given by statute, or the ordinance of an incorporated city, or town. * * * " The meaning intended to be conveyed by this statute is that the jurisdiction of the justice of the peace court extends to an action for the recovery of

a fine, penalty, or forfeiture given by statute or ordinance, where the amount in controversy does not exceed \$300. Under such a statute the jurisdiction of the court is not dependent upon the amount which plaintiff might recover, but upon the amount which he demands. This question has been determined so often that it is now beyond the range of controversy. (11 Cyc. 775; 1 Ency. Pl. & Pr. 703; Brown on Jurisdiction, 2d ed., sec. 19b.) The principle of the rule is recognized by the Code (sec. 7052, Rev. Codes), which allows the prevailing party to remit any excess over the amount fixed as the limit of the jurisdiction of a justice of the peace court.

2. In the justice's court the defendant interposed a demurrer for misjoinder of causes of action, and now contention is made that the objection raised should have been sustained. Section [2] 7008, Revised Codes, provides that a defendant in a justice of the peace court may demur to the complaint upon any ground of demurrer enumerated in the district court Practice Act, except the one ground "that causes of action have been improperly united." In this exception is disclosed the legislative design to make the justice of the peace court a forum serviceable to the people, where litigation may proceed without the aid of attorneys or those familiar with the rules of pleading, and to encourage the assertion by a party of all existing claims in one action and avoid multiplicity of suits. The legislature thus opened the way for the joinder, in one complaint, of all the causes of action which a plaintiff has against his adversary, provided only that they be of such character that the justice of the peace court has jurisdiction of each of them, and that the aggregate of the demands does not exceed \$300. The language employed in *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695, is to be understood in the light of the facts of that case. There was not any question of misjoinder involved, and this court's observation upon subdivision 4, sec. 66, Code of Civil Procedure (now subdivision 4 of section 6286, above), was designed to characterize a single cause of action which might arise under that statute,

and was not intended to establish a rule that such a cause of action cannot be joined with any other.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

DAHMER, RESPONDENT, v. NORTHERN PACIFIC RAILWAY
COMPANY ET AL., APPELLANTS.

(No. 3,278.)

(Submitted September 20, 1913. Decided October 25, 1913.)

[136 Pac. 1059.]

*Personal Injuries—Railroads—Stations—Duty to Keep Look-
out—Technical Trespassers—Last Clear Chance Doctrine—
Through Trains—Discovery of Peril—Insufficient Evidence.*

**Personal Injuries—Railroads—Last Clear Chance Doctrine—When Appli-
cable.**

1. A case calling for the application of the last clear chance doctrine, in a personal injury action, must embody the following three elements which must concur: (1) The exposed condition brought about by the negligence of the person injured; (2) the actual discovery by the defendant of the perilous situation of the person; and (3) defendant's failure to thereafter use ordinary care to avert the injury; hence the doctrine was inapplicable where the first requisite, *i. e.*, antecedent negligence on the part of the injured person, was lacking.

[As to application of last clear chance rule to persons standing or walking close to railroad track, see note in Ann. Cas. 1912B, 1242. As to concurrent negligence of plaintiff as defeating recovery under last clear chance doctrine, see note in Ann. Cas. 1912B, 888.]

Same.

2. The rule of the last clear chance as stated in paragraph 1, *supra*, does not impose upon the defendant in a personal injury action the obligation to maintain a lookout at all times to discover anyone who may be in a position of peril, but includes those cases in which actual discovery of the peril is a just inference from the evidence, though denied by defendant, as well as those in which the discovery is admitted or not denied, and liability is sought to be avoided on other grounds.

Same—Railroads—Stations—Duty to Maintain Lookout.

3. A railway company must, under penalty of liability for resultant injury because of failure of duty in this regard, use special care and watchfulness in the running of its trains when approaching points along its line where the presence of persons, especially in large numbers, may reasonably be anticipated.

Same—Technical Trespassers—Duty of Railways.

4. Notwithstanding one who goes upon the premises of a railway company at its invitation to transact business with it or to meet a person on an incoming train is technically a trespasser if he gets upon the track at places at which crossings are not provided, the company must use reasonable precaution to avoid injuring him.

Same—Railways may Run Through-trains—Notice to Public.

5. A railway company may run through-trains which stop only at principal stations, and persons desiring to know when and where such trains stop must ascertain the information from its agents, and conduct themselves accordingly, it not being incumbent upon a carrier to bring home to the public notice of such matters.

Same—Limitation of Duty to Keep Lookout.

6. The duty of a railroad company to keep a lookout for persons when running a through-train past stations at remote and out of the way places must be measured by the character of such places, the time of the day or night when they are reached, and other like circumstances.

[As to duty of railroad company to trespassers on track, see note in 30 Am. St. Rep. 53.]

Same.

7. *Held*, under the rule declared in paragraph 6, *supra*, that defendant railway company was under no greater obligation to keep a lookout at a station which was passed by one of its through-trains at an early hour in the morning, when it could not reasonably be anticipated that persons were present to become passengers or engage in the transaction of business with its agent, than it was in the open country or at any other place at which persons were not expected to be.

Same—Discovery of Peril—Evidence—Insufficiency.

8. Evidence *held* insufficient to justify the conclusion that defendant locomotive engineer discovered the position of plaintiff—who, while waiting at about 1 o'clock in the morning for the arrival of a passenger train at a small station where it was not scheduled to stop, and which he had no reason to think would stop other than information to that effect by a friend, had been beaten into partial insensibility by thugs and fallen upon the tracks, where he was run over while endeavoring to crawl to safety—in time to avoid injuring him.

Appeal from District Court, Yellowstone County. Geo. W. Pierson, Judge.

ACTION by John Dahmer against the Northern Pacific Railway Company and Michael McDonough. Plaintiff had judgment, and defendants appeal from it and an order denying them a new trial. Reversed and remanded for new trial.

Messrs. Gunn, Rasch & Hall, and Mr. W. M. Johnston, for Appellants, submitted a brief. Mr. Carl Rasch argued the cause orally.

The question is presented on this appeal whether a liability for damages exists under the doctrine of "last clear chance,"

where a person is injured upon a railroad track, at a place where he has no right to be, and where his presence could not be reasonably expected or anticipated, because of the failure of the engineer in charge of the train to discover such person's position and peril upon the track in time sufficient to stop the train and avoid injuring him. It is of no importance how plaintiff got upon the track, because, in the absence of actionable negligence on the part of the engineer, it is immaterial whether his being there was voluntary or due to "some circumstance beyond his control," as no recovery can be had in either case. (2 Thompson on Negligence, sec. 1792; *Missouri Pac. Ry. Co. v. Brown* (Tex.), 18 S. W. 670; *Gulf C. & S. F. Ry. Co. v. Bolton*, 2 Ind. Ter. 463, 51 S. W. 1085; *Oklahoma City R. Co. v. Barkett*, 30 Okl. 28, 118 Pac. 350; *O'Keefe v. Chicago etc. R. Co.*, 32 Iowa, 467.) Whatever the duty of the defendant engineer may have been to discover a person crossing the track in a proper manner and for a lawful purpose in going to or returning from the station, no such duty rested upon him with respect to the plaintiff lying upon the track at a place where he had no right to be, and in a position that could not have been reasonably expected or anticipated. (*Kelly v. Michigan Cent. R. Co.*, 65 Mich. 186, 8 Am. St. Rep. 876, 31 N. W. 904; *Cleveland etc. Ry. Co. v. Marsh*, 63 Ohio St. 236, 52 L. R. A. 142, 58 N. E. 821; *Ryerson v. Bathgate*, 67 N. J. L. 337, 57 L. R. A. 307, 51 Atl. 708; *Pennsylvania R. Co. v. Martin*, 111 Fed. 586, 55 L. R. A. 361, 49 C. C. A. 474; *Diebold v. Pennsylvania R. Co.*, 50 N. J. L. 478, 14 Atl. 576; *Price v. Pecos Valley etc. Ry. Co.*, 15 N. M. 348, 110 Pac. 565; *Chicago R. I. & P. Ry. Co. v. Eining*, 114 Ill. 79, 29 N. E. 196; *Neely v. Charlotte etc. R. R. Co.*, 33 S. C. 136, 11 S. E. 636; *St. Louis etc. Ry. v. Monday*, 49 Ark. 257, 4 S. W. 782; *Carrington v. Louisville etc. R. Co.*, 88 Ala. 472, 6 South. 910; *Texas etc. Ry. Co. v. Hare*, 4 Tex. Civ. App. 18, 23 S. W. 42; *Sindlinger v. Kansas City*, 126 Mo. 315, 26 L. R. A. 723, 28 S. W. 857; *Newport News & M. V. Co. v. Howe*, 52 Fed. 362, 3 C. C. A. 121; see, also, *Lynch v. Great Northern R. Co.*, 38 Mont. 511, 100 Pac. 616; *Carman v. Montana Central R. Co.*,

32 Mont. 137, 79 Pac. 690; *Egan v. Montana Central Ry. Co.*, 24 Mont. 569, 63 Pac. 831; *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373; *Southern Ry. Co. v. Drake*, 166 Ala. 540, 51 South. 996.) The doctrine, "held by a few courts only," imposing liability where discovery "might have" been made by the exercise of ordinary care is "incapable of vindication upon principle." (2 Thompson on Negligence, sec. 1711.)

Reasonable care to avoid injury after discovery of plaintiff's position and peril was all the law demanded. A duty to discover is not imposed in cases of this kind. The first duty of defendant engineer was that which he owed to the passengers in his charge upon the train; and as to them, he was required to "use the utmost care and diligence for their safe carriage" (Rev. Codes, sec. 5300; *Bemis v. Connecticut etc. R. R. Co.*, 42 Vt. 375, 1 Am. Rep. 339); and in order to perform his full duty to them, it was incumbent upon him not only to watch the track, but the order board at the station and the junction switch beyond the station as well. In *Chesapeake & O. R. Co. v. Farrow's Admx.*, 106 Va. 137, 10 Ann. Cas. 12, 55 S. E. 569, it was held that where the circumstances were such that the duty to keep a lookout was owing to the injured person, which was not required in the case at bar, no negligence could be predicated upon the failure to observe a person upon the track in time to avoid striking him, if the person in charge of the train and the engine was at the time "engaged in the performance of a necessary duty which he could not neglect." (See, also, *Howard v. Louisville etc. Ry. Co.*, 67 Miss. 247, 19 Am. St. Rep. 302, 7 South. 216; *O'Brien v. Wisconsin Cent. R. Co.*, 119 Wis. 7, 96 N. W. 424; *Rogers v. Georgia R. R. Co.*, 100 Ga. 699, 62 Am. St. Rep. 351, 28 S. E. 457; *Eddy v. Sedgwick* (Tex.), 18 S. W. 564; *Brammer's Admr. v. Norfolk etc. R. Co.*, 104 Va. 50, 51 S. E. 211.)

Messrs. Walsh, Nolan & Scallon, for Respondent, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

The respondent at the railway station to meet a passenger on the incoming train was there in such a capacity that the com-

pany owed him the duty of exercising reasonable care for his safety. "Persons, however, having duties to perform incidental to the departure and arrival of passengers, and all persons having business with the company, such as shippers and consignees of freight, are entitled to the use of the company's premises, and are entitled to the same protection as passengers from injury while thereon." (Thompson on Negligence, sec. 2686; 23 Am. & Eng. Ency. of Law, 736; 33 Cyc. 762; White on Personal Injuries on Railroads, sec. 867; *Rowley v. Chicago, M. & St. P. R. Co.*, 135 Wis. 208, 115 N. W. 865; *Dowd v. Chicago, M. & St. P. Ry. Co.*, 84 Wis. 105, 36 Am. St. Rep. 917, 20 L. R. A. 527, 54 N. W. 24; *Hamilton v. Texas & Pac. Ry. Co.*, 64 Tex. 251, 53 Am. Rep. 756; *Atchison etc. Ry. Co. v. Cogswell*, 23 Okl. 181, 20 L. R. A. (n. s.) 837, 99 Pac. 923; *Chesapeake & O. R. Co. v. Fortune*, 107 Va. 412, 59 S. E. 1095; *Texas & Pac. Ry. Co. v. Best*, 66 Tex. 116, 18 S. W. 224; *Denver & R. R. Co. v. Spencer*, 27 Colo. 313, 51 L. R. A. 121, 61 Pac. 606; *Winscott v. Chicago & A. R. Co.*, 151 Mo. App. 378, 131 S. W. 749; *Louisville & N. R. Co. v. Smith*, 135 Ky. 462, 122 S. W. 806; *Union Depot & Ry. Co. v. Londoner* (Colo.), 114 Pac. 316; *Dowd v. Chicago M. & St. P. R. Co.*, 84 Wis. 105, 36 Am. St. Rep. 917, 20 L. R. A. 527, 54 N. W. 24; Elliott on Railroads, 2d ed., sec. 1256.) The respondent, then, was at the station not as a trespasser, but as one to whom the company and its employees owed the duty of exercising reasonable care to see that he was not injured. Injured on the platform, through its failure to exercise this care, he could recover. Is he placed in a more unfavorable situation by being upon the track without any fault of his? We contend that he is not, and we contend likewise that, in connection with his being upon the track, as he was, he was in no manner negligent. A trespasser is one who does an unlawful act or a lawful act in an unlawful manner to the injury of the person or property of another. (*Little v. State*, 89 Ala. 99, 8 South. 82.) A trespasser is a wrongdoer. (*Smalley v. Southern Ry. Co.*, 57 S. C. 243, 35 S. E. 489.) A person not *sui juris* cannot be a trespasser in the legal signification of the term. (*Barre v.*

Reading City Passenger Ry., 155 Pa. 170, 26 Atl. 99.) It is well to bear in mind that the respondent was upon the track without fault on his part, and so being there, the company and its employees owed him the duty of exercising reasonable diligence to prevent the infliction of injury upon him. (*Bourrett v. Chicago & N. W. Ry. Co.* (Iowa), 121 N. W. 380; *Brackett, Admr., v. Louisville & N. R. Co.*, 33 Ky. Law Rep. 921, 111 S. W. 710; *International & G. N. R. Co. v. Jackson*, 41 Tex. Civ. App. 51, 90 S. W. 918.)

Most of the cases cited in appellants' brief discuss the doctrine of the last clear chance, as applied to trespassers. Appellants assume as an admitted fact that the respondent was a trespasser, but, as shown, this is an assumption that cannot be sustained. For the sake of argument, however, and more for the purpose of discussing the doctrine in the abstract, we wish to state a consideration of the cases of *Melzner v. Northern Pac. R. Co.*, 46 Mont. 162, 127 Pac. 146, and *Haddox v. Northern Pac. R. Co.*, 46 Mont. 185, 127 Pac. 152, justifies the assumption that, in the case of one guilty of negligence to whom a duty is owing, the doctrine announced in the *Neary Case* (*Neary v. Northern Pac. R. Co.*, 37 Mont. 461, 19 L. R. A. (n. s.) 446, 97 Pac. 944) is the rule in this jurisdiction, and as to a trespasser the fixed rule has not yet been declared. For the purpose of settling the question in this jurisdiction, we insist that, in the application of the doctrine of the last clear chance, as applied to a trespasser on a railroad track where persons are expected to be, it would be barbarous to hold that an engineer may be permitted to operate his train without any duty resting on him to look ahead, so as to protect those who may be on the track, operating as he does so deadly a contrivance as a moving locomotive. The overwhelming weight of authority in this country and in England is to the effect that no duty to look out obtains where the presence of a trespasser is not anticipated, as in the case of running in the country; but where trespassers are anticipated, equally true is it that the overwhelming weight of authority is to the effect that the duty to look out obtains. The supreme

court of Missouri, in *Eppstein v. Missouri Pac. R. Co.*, 197 Mo. 720, 94 S. W. 967, said: "Where the trespasser is on the track in a place where the company has reason to anticipate the presence of persons, it owes him a lookout duty." (See, also, *Chesapeake & O. R. Co. v. Nipp*, 125 Ky. 49, 100 S. W. 246; *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361; *Johnson v. Louisville & N. R. Co.*, 122 Ky. 487, 91 S. W. 707; *Fleming v. Louisville & N. R. Co.*, 106 Tenn. 374, 61 S. W. 58; *Texas Midland Co. v. Crowder*, 25 Tex. Civ. App. 536, 64 S. W. 90; *Chesapeake & O. R. Co. v. Rodgers*, 100 Va. 324, 41 S. E. 732.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

A jury having returned a verdict for damages against the defendants for a personal injury alleged to have been inflicted upon plaintiff through their negligence, they have appealed from the judgment entered thereon and an order denying them a new trial. The accident occurred at Huntley, a small village in Yellowstone county, at the junction of the Chicago, Burlington & Quincy Railway with that of the defendant railway company. Both roads extend east and west through the village, the companies making use of the same depot or station, the track of the defendant company, with platform for the receipt of freight and the accommodation of passengers, being on the side toward the north, that of the other company on the side toward the south. Immediately north of the defendant company's track is a driveway of ordinary width, and persons going to or coming from the station on that side are compelled to cross the driveway and the track. For the accommodation of those who approach the station on foot the defendant company has provided a gravel or cinder path extending from the principal street of the village to the north line of the railway. From the end of the path the waiting-room, which is at the west end of the station building, is reached by going directly south to the east end of the platform and thence west, or by going southwest to the platform to a point in front of the door opening into the waiting-room.

These lines of travel are used indifferently. The evidence does not disclose how those who come and go by conveyances reach the station, but there is some basis for the inference that they must alight at the driveway and gain the station by crossing the track. So far as the record shows, access to it can be gained only in the way stated. At the time of the accident the plaintiff was temporarily in the village of Huntley on business and was stopping at a hotel north of the station. On the evening before it occurred he was expecting his mother to arrive on a train designated as No. 4, due from the west at about 8 o'clock. He ascertained, however, that No. 4, being several hours late, would not arrive until after midnight. He was also expecting to meet a business acquaintance who he claimed was to arrive on a train designated as No. 3, from the east, which was due at 1:18 o'clock. Accordingly, he went to the station some fifteen or twenty minutes after midnight. Having found that No. 4 would not arrive until some two and a half hours later, he remained awaiting the arrival of No. 3. As this train approached he stood on the east end of the platform observing it. When it was yet at a distance of eight or nine hundred feet from the station someone dealt him from behind a heavy blow upon the head, from which he staggered and fell from the platform upon the rails, being for the moment "partially stunned." While he was in the act of crawling off the track toward the north, the train came upon him inflicting such injuries that he thereby suffered the loss of both feet. To this narrative may be added the statement of the plaintiff as to his situation at the moment he was caught by the train: That in his effort to escape he had gotten clear of the rail except his right foot, and that as he was drawing it over it was caught by a piece of wire lying near the rail, which caused a delay of a few seconds—a sufficient time to allow the wheels to catch him. The left foot, he stated, must have been drawn under the wheels as he was rolled over by the impact of the wheels with his right foot. That this account is probably correct finds support in the fact that on the following morning witnesses who went to look over the ground found

a wire lying near the north rail along the side of the path leading from the platform where the plaintiff was picked up after the train had passed, and also by the fact that his right foot was crushed at the ankle, whereas his left foot was crushed at the instep.

The complaint alleges that the defendant company was guilty of negligence in permitting the wire to remain where it was, inasmuch as it must have known that the wire was there and that it was a source of danger to persons going to and from the station. But during the trial the issues in this behalf were eliminated from the case. The specific charge upon which recovery was had is the following: "That the said defendant McDonough, so acting as engineer as aforesaid, in the exercise of reasonable care and diligence, could have seen plaintiff so upon said track, as aforesaid, and plaintiff alleges, on information and belief, that the said McDonough did see him on said track as aforesaid, in seasonable time to have stopped said locomotive and train so as to avoid striking plaintiff, but the defendant company, acting through the said McDonough as engineer, and the said defendant McDonough, wholly failed and neglected to stop said locomotive engine and train, and carelessly and negligently drove and ran said locomotive engine and train upon and over said plaintiff, so on said track as aforesaid, thereby crushing both of his feet to such an extent that it became necessary to amputate the same, which was thereafter done."

Counsel for defendants open the argument in their brief with the following statement: "The question is presented on this appeal whether a liability for damages exists under the doctrine of 'last clear chance,' where a person is injured upon a railroad track, at a place where he has no right to be and where his presence could not be reasonably expected or anticipated, because of the failure of the engineer in charge of the train to discover such person's position and peril upon the track in time sufficient to stop the train and avoid injuring him." Assuming the position that plaintiff was a trespasser upon the defendant company's track, and that the evidence fails to show that the en-

gineer actually discovered his presence there, they insist that the trial court should have directed a verdict for the defendants, because the duty to adopt any precaution to avoid injuring the plaintiff did not arise. They thus rely upon the rule of the last clear chance. Counsel for plaintiff insist that this rule has no application to the case, but that the plaintiff, having gone to the station to meet his mother and having remained there to meet his friend who was to arrive on train No. 3, he was there rightfully because there upon the invitation of the defendant company, and hence that under the rule that it is the duty of a railway company to anticipate the presence of persons about its stations when a train is arriving, including those who go to meet an incoming passenger as well as those who accompany a departing one, and to exercise ordinary care for their safety, the engineer was under obligation to keep a constant lookout to discover plaintiff's position and thus to avoid injuring him. They also argue that the evidence shows conclusively that the engineer must actually have discovered the peril of plaintiff in time to stop the train, and hence that the defendants are liable [1] even under the rule invoked by counsel. The court was of the opinion that the rule of the last clear chance is applicable, as is shown by the following instruction, which discloses the theory of the charge submitted: "You are instructed that in this case if the engineer discovered, or in the exercise of reasonable diligence could have discovered, the position of the plaintiff on the track, if you find that he was upon the track in the manner in which he says he was, and it was apparent to the engineer that the plaintiff could not escape from the track so as to avoid being run over, the duty became imperative upon him to use all reasonable care to avoid running over the plaintiff or injuring him, and if he did not do so and the plaintiff was injured, then the defendants under such circumstances would be liable for the injuries inflicted." Counsel find no fault with the statement of the rule as embodied in the instruction. It may be remarked, however, that the rule is limited in its application to those cases only in which the plaintiff, or the person

injured or his property, has by his own act been exposed to injury at the hands of the defendant, and the defendant, after discovering the situation of the person or property in time, has failed to use ordinary care to avert the injury. (1 Thompson on Negligence, sec. 228.) A case calling for its application embodies three elements, viz.: (1) The exposed condition brought about by the negligence of plaintiff or the person injured; (2) the actual discovery by the defendant of the perilous situation of the person or property, in time to avert injury; and (3) the failure of defendant thereafter to use ordinary care to avert the injury. All of these elements must concur, else the rule has no application, and liability must be predicated upon the failure of defendant to discharge toward the person injured or his property, some other duty imposed by law under the facts of the particular case as they are made to appear. The duty imposed by it is, not to use ordinary care to discover the peril and also to avert the threatened injury, but to avert the injury after the perilous situation is actually discovered. It is nothing more than a qualification, by way of exception, to the general rule that negligence on the part of plaintiff which proximately contributes to his injury will bar his recovery. So the rule is understood and applied by the courts generally. (*Davies v. Mann*, 10 Mees. & W. 546; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485, 12 Sup. Ct. Rep. 679; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. Ed. 270, 11 Sup. Ct. Rep. 653; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75, 3 Am. Rep. 663; *Northern Central Ry. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545; *Vicksburg etc. Ry. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *Cullen v. Baltimore etc. R. Co.*, 8 App. D. C. 69; *Western Maryland R. Co. v. Kehoe*, 83 Md. 434, 35 Atl. 90; *Omaha St. Ry. Co. v. Cameron*, 43 Neb. 297, 61 N. W. 606; see, also, 1 Thompson on Negligence, sec. 238; 2 Id., sec. 1735.) This court recognized and applied the rule in *Egan v. Montana Central Ry. Co.*, 24 Mont. 569, 63 Pac. 831, *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373, and *Neary v. Northern Pacific R. Co.*, 37 Mont. 461, 19 L. R. A. (n. s.) 446, 97 Pac. 944.

In the course of the argument in the opinion in the last [2] case, in stating the qualification of the general rule, it was said: "The general rule that one's own negligence in such case precludes recovery is subject to the qualification that, where the defendant has discovered, or should have discovered, the peril of the plaintiff's or deceased's position, and it is apparent that he cannot escape therefrom or for any reason does not make an effort to do so, the duty becomes imperative for the defendant to use all reasonable care to avoid the injury; and if this is not done, he becomes liable, notwithstanding the negligence of the injured party." The expression "or should have discovered," as used in this passage, seems to have been understood by some members of the profession in this state to imply an obligation on the part of the defendant to maintain a lookout at all times, to discover anyone who may be in a position of peril, as well as to exercise due care thereafter to avoid injuring him, and that by an omission of this duty liability would arise for any injury caused thereby. The use of the expression was unfortunate and perhaps justifies the doubt entertained as to the application this court would make thereafter of the qualification of the general rule; but a careful reading of the opinion does not, we think, justify any other conclusion than that the statement was intended to include those cases in which the actual discovery of the peril is a just inference from the evidence, though denied by the defendant, as well as those cases in which the discovery is admitted or not denied, and liability is sought to be avoided on other grounds. Doubtless, in formulating the instruction in this case, the trial court was laboring under the uncertainty induced by the statement of the rule as there made. But be this as it may, it has no application unless all of the elements heretofore enumerated appear in the case. It has no application to this case, because there was no antecedent negligence on the part of plaintiff.

A person, however, may be put in a position of peril by circumstances for which he is not responsible, and for this reason is not chargeable with antecedent negligence. To illustrate:

Thugs may beat into insensibility and rob a man near a railroad. To destroy the evidence of their crime, they place their victim upon the track so that he may be killed by a passing train. It cannot reasonably be anticipated that anyone will be upon [3] the track at that place; yet if those in charge of a train discover his situation, it at once becomes their duty to exercise such care as they may under the circumstances to avoid injuring him. If they discover him while it is still within their power, by the exercise of ordinary care, to stop the train, they must do so, under the penalty of making themselves and their employer liable. The plaintiff in this case was on the track without his own fault; yet to say that the engineer, though seeing his peril, was not bound to exercise such care as he could to avoid injuring him, is equivalent to saying that the engineer was at liberty to take his life because he was so unfortunate as to have been forced from his place of safety on the platform, upon the track by the blow which he received from behind. In such a case the obligation to exercise reasonable care to avoid injury must be observed. Of course, if the defendant company was under obligation to keep a lookout at Huntley station, then, under the rule for which counsel for plaintiff contend, the question is not whether the engineer did discover plaintiff's position in time to avert the injury, but whether under the circumstances he ought to have discovered it. We think the weight of authority gives support to the rule that a railway company is bound to use special care and watchfulness at points upon or near its track and at its open stations where the presence of persons, especially in considerable numbers, may reasonably be anticipated. On this subject Mr. Thompson says: "At such
" " railway company is bound to anticipate the presence on the track, to keep a reasonable lookout for them, ringing signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any person injured, subject, of course, to the qualification that

his contributory negligence may bar a recovery.” (2 Thompson on Negligence, sec. 1726.) It is a matter of common knowledge that at such places persons often do not fully appreciate the dangers incident to the coming and going of trains, or that they grow careless and inattentive to such an extent that they unconsciously fall into danger. It is also true that when, as in this case, the approach to a station is such that its use by those endeavoring to reach or leave trains, or to go there to transact business with the company’s agents requires them to cross the track, they may expose themselves to the same danger from the moving of trains as is encountered at highway crossings. Therefore, a rule which requires the railway company to keep a lookout when its trains are approaching such places, is humane and conservative of human life. Such a rule finds recognition in the following cases: *Thomas v. Chicago, Milwaukee & St. Paul Ry. Co.*, 103 Iowa, 649, 39 L. R. A. 399, 72 N. W. 783; *Eppstein v. Missouri Pac. R. Co.*, 197 Mo. 720, 94 S. W. 967; *Chesapeake & Ohio R. Co. v. Nipp’s Admx.*, 125 Ky. 49, 100 S. W. 246; *Johnson v. Louisville & N. R. R. Co.*, 122 Ky. 487, 91 S. W. 707; *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361; *Fleming v. Louisville & N. R. Co.*, 106 Tenn. 374, 61 S. W. 58; *Texas Midland R. Co. v. Crowder*, 25 Tex. Civ. App. 536, 64 S. W. 90; *Chesapeake & Ohio R. Co. v. Rodgers*, 100 Va. 324, 41 S. E. 732; *Brackett’s Admr. v. Louisville & N. R. R. Co.*, 33 Ky. Law Rep. 921, 111 S. W. 710; see, also, note to *Martin v. Hughes Coal Creek Co.*, 41 L. R. A. (n. s.) 267; *Palmer v. Oregon Short Line R. Co.*, 34 Utah, 466, 16 Ann. Cas. 229, 98 Pac. 689. The rule includes all persons at places where their presence may be reasonably anticipated, whether they have business relations with the railway company or not; and while those who go upon the premises [4] of the company by invitation to transact business with it are technically trespassers if they get upon the track at places away from the crossings provided for them, nevertheless the company cannot be permitted wholly to omit all precautions for their safety. Whether or not the railway company is bound

to keep a lookout at any time depends upon the circumstances of the particular case.

This brings us to the question whether the evidence from any [5-7] point of view is sufficient to charge the defendant. Neither of the trains designated as No. 3 and No. 4 was scheduled to stop at Huntley. Both were through-trains. This fact seems to have been generally known. Whether the plaintiff knew that train No. 4 would not stop, the evidence does not disclose; he was informed, however, that train No. 3 would not stop. The only reason he had for thinking the contrary was that he had a telephone message from his friend that the latter would arrive on that train. Not having been informed by any agent of the company that the train would stop, he had no reason to think that it would. His presence at the time, then, was not by invitation of the company. In order to meet the demands of present-day conditions, railway companies may run through-trains consisting wholly of Pullman cars, provided they make suitable provision to accommodate persons who do not care to use such trains by other trains running at reasonable intervals. (*Doherty v. Northern Pacific R. Co.*, 43 Mont. 294, 115 Pac. 401.) For the same reason, and under like restrictions, they may run through-trains without stopping except at principal stations. In such cases it is not incumbent upon them to bring home to the public notice of their rules designating the stations at which their trains will stop in order to take on or discharge passengers. Persons desiring to know when and where such trains stop are under obligation to inquire for information from the agents of the company and to conduct themselves accordingly. The duty to keep a lookout in passing stations at remote and out of the way places, if it arises, is to be measured by the character of such places, the time of the day or night when they are reached, and other like circumstances; and if, as in this case, the station is one which is passed at an early hour in the morning when it cannot reasonably be anticipated that persons are present to become passengers or to engage in the transaction of business with the agents of the company, the company is under

no more obligation to keep a lookout than it is in the open country or at any other place where persons are not expected to be. Of course, the company may not relax the care and vigilance necessary to the safety of its passengers. The obligations in this behalf, however, do not require it to keep a lookout for those who chance to be in the way of its trains at places where their presence cannot reasonably be anticipated, whether they are technically trespassers or not. Under the circumstances disclosed here, there was no obligation to keep a lookout.

Nor do we think that the evidence justifies the conclusion that [8] the engineer discovered the position of plaintiff. According to the testimony of defendant McDonough, as he approached the station his duty under the rules of the company required him to observe the semaphore for signals and the switchlights in order to determine whether the track was clear. This duty continued until he had passed the station. He stated that as he approached the station, having reduced the speed of his train to twenty-five miles per hour, he was observing the semaphore above and beyond the station for signals; that he was also observing the switchlight at the junction of the track with that of the Chicago, Burlington & Quincy Railway, which was also beyond the station, incidentally watching the line of track as it was disclosed by the headlight, and that he did not discover any object upon the track at all. There was evidence to the effect that the body of a man lying on the track could be distinguished as such probably from a distance of 350 to 400 feet, a space amply sufficient to give the engineer time in which to stop the train when going at the rate of twenty-five miles an hour. Whether a person crossing the track in the position in which plaintiff was could be seen, to quote the words of an experienced engineer who was examined by the plaintiff, "would depend on whether or not a man's vision was directed away from the rail for an instant. It could be seen between five and six hundred feet if he was looking at nothing else, and would accordingly see the object." The witness stated further: "If the engineer's attention was called to the object as he drew nearer to it, he

could discern something as to what it was. At a distance of 400 feet the object would have to move quite a little; something so that it would draw his attention. It would have to move enough so that he could see what it was. He would have to get within two or three hundred feet of it to see whether it was a dog or a person. At a distance of three hundred feet the light would be of such a character that if he saw the object he could tell whether it was a dog or a person. If a man's vision caught that object I would say he could tell what it was within two or three hundred feet of it." This witness also stated that supposing the plaintiff had gotten his body entirely off the rail, except his right foot, whether the engineer could see the foot would depend "a whole lot" upon the nature of the place, "whether the end of the ties stuck above the ground, * * * whether it was a smooth place, * * * whether or not there was a dip," and whether or not he got a glimpse of it by reason of its movement. It may be added that the condition of vegetation along the track, if there was in fact any there, the shadows cast by the light and other similar conditions might have been considered as affecting the opinion expressed by the witness if they had been called to his attention. What the conditions actually were the evidence does not disclose. Taking into consideration the fact that the engineer was not required to keep a lookout for persons on the track; that his attention was necessarily directed to the semaphore and the junction lights; that as soon as the plaintiff fell upon the track he hastened as rapidly as he could to crawl across it; and that at the moment of the collision his right foot only was over the line, the qualified opinion of this witness and one other who gave similar testimony, was not, we think, evidence sufficient to justify the conclusion that the engineer saw the plaintiff at all. Besides, if plaintiff's own account of his situation is to be accepted as true, the engineer, though he saw plaintiff's foot upon the rail, was not bound to make an effort to stop the train; for he could not anticipate that anything would then interfere to prevent

plaintiff from getting entirely clear of the track before the train would reach him.

The district court should have directed a verdict for the defendant. The judgment and order are accordingly reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

ON MOTION FOR REHEARING.

(Submitted November 17, 1913. Decided December 24, 1913.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

It is said by counsel for plaintiff in the brief accompanying their motion for a rehearing, that the court based its decision upon a proposition that was not argued orally nor discussed in the briefs, *viz.*: that "train No. 3, not being scheduled to stop at Huntley station, the engineer was not required to keep a reasonable lookout and to that extent owed no duty to respondent on the track, although not there as a trespasser." It is now insisted that since Huntley is a union station, it was the duty of the engineer, as a matter of law, to anticipate the presence of persons there at any time and keep a reasonable lookout for them, because, though trains Nos. 3 and 4 were not scheduled to stop, trains upon the Chicago, Burlington & Quincy Railway, either on schedule time or belated, might be there, receiving or discharging passengers. The evidence does not disclose anything touching the movement of trains on the latter railway. It may be that the schedule was such that trains reached and left the station only in the daytime, and that at the hour at which defendant's train reached the station it could not reasonably be anticipated that anyone would be there. If this was the fact, the duty to keep a lookout did not arise, for it cannot be said, as a matter of law, that it is the duty of a railway company to keep a lookout without reference to conditions existing at the

particular place. The burden rested upon the plaintiff to show that he received his injuries through the negligence of the defendant. In order to do this he must have disclosed facts and circumstances furnishing a basis for an inference that he would not have suffered injury but for a violation of duty owed him by the defendant. If it was the fact that the movement of trains on either railway was such that the presence of persons at the station at all hours of the day or night should reasonably have been anticipated, and the corresponding duty arose to keep a lookout at all times, it was a part of plaintiff's case to show this. As we have said, there was no evidence as to the movement of trains on the Chicago, Burlington & Quincy Railway. Indeed, the trial of the case was conducted upon the theory, not that the defendant owed to the plaintiff the duty to anticipate his presence and keep a lookout for him, but on the theory that the engineer actually discovered his peril and failed to exercise reasonable precautions to avoid injuring him. We held that the evidence does not disclose any liability on this theory. In other words, we determined the case on the theory upon which it was tried in the court below. If upon another trial the evidence discloses circumstances which imposed upon the engineer in charge of train No. 3 the duty to keep a lookout as he approached the station, a case may be made for the jury as to whether he did so, and whether, under the circumstances, he might, by the exercise of ordinary care, have averted the injury. Otherwise plaintiff cannot recover.

Counsel have entered into a discussion of the last clear chance rule and its application to particular cases suggested. In the original opinion we distinguished generally the cases in which it applies from those in which it does not. We think the rule is stated there as it is generally accepted and understood, and does not in any way limit the liability of a railway company for the failure of those in charge of its trains to keep a lookout upon approaching public crossings, or stations, or any other places where the presence of persons must reasonably be anticipated. Counsel would have us lay down a rule by which the

railway company is required to keep a lookout at all places along the line of its track. There are cases which announce this doctrine; but the great weight of authority is opposed to it. In the absence of legislation exacting such a requirement, we do not feel disposed to recognize it.

The motion is denied.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

LIZOTT, RESPONDENT, v. BIG BLACKFOOT MILLING CO.,
APPELLANT.

(No. 3,283.)

(Submitted October 21, 1913. Decided October 29, 1913.)

[136 Pac. 46.]

*Personal Injuries—Evidence—Insufficiency—New Trial—Jury—
Finding—Conclusiveness.*

New Trial—Jury—Conclusiveness of Verdict—Evidence—Weight.

1. Under the rule that a verdict based upon evidence presenting a substantial conflict, which was adopted by the trial court upon a motion for a new trial, is not subject to review on appeal, *held*, that the fact that plaintiff's unsupported statement relative to the existence of a defect in a pathway provided for him by defendant in its logging operations, was directly contradicted by a number of defendant's witnesses, did not result in rendering his evidence so insufficient as not to support a verdict in his favor, since the effect and value of evidence is a matter exclusively for the jury, who are not bound to decide in conformity with the declarations of any number of witnesses as against a less number.

Same—Discretion—Conflicting Evidence.

2. Where the evidence is in substantial conflict, the supreme court is not justified in holding that the trial court abused its discretion in refusing a new trial merely because, as it is made to appear in the transcript, the evidence seems to preponderate against the verdict.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by Thady Lizott against the Big Blackfoot Milling Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Mr. Henry C. Stiff, for Appellant, submitted a brief and argued the cause orally.

Messrs. Harry H. Parsons and *Albert Besancon*, for Respondent, submitted a brief; *Mr. Besancon* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff recovered a judgment for damages for a personal injury suffered during the course of his employment by the defendant. The defendant has appealed from the judgment and an order denying its motion for a new trial.

The plaintiff was employed by defendant at its logging camp near St. Regis, in Missoula county. The work assigned to him, and in which he was engaged at the time he was injured, was the moving of logs along a skidway to a point at which they could be piled or "decked," so that they could be conveniently loaded upon sleighs or wagons for transportation to defendant's mill. His office was, by the aid of an assistant, to control the movement of the logs by the use of a cant-hook down the decline of the skidway, he being on one side, and the assistant on the other. It is alleged that the defendant failed to exercise ordinary diligence to furnish the plaintiff a reasonably safe place in which to work, in that the pathway along which the plaintiff was required to walk while moving the logs was unsafe and dangerous by reason of the existence therein of a hole caused by the removal of a stump by the defendant in clearing the ground for the skidway; that the hole was covered by protruding roots, leaves and other loose materials, so that it could not be seen; that while moving a log the plaintiff stepped into the hole, and fell; and that, being thus compelled to release the handle of the cant-hook which he had fastened upon the log, he was caught by it as it was forced over by the weight of the log, and sustained a fracture of his left leg below the knee, resulting in his permanent disability. The defendant denied negligence in the particular charged, and alleged the usual defenses of contributory negli-

gence and assumption of risk. The plaintiff having adduced sufficient evidence to make a *prima facie* case, the defendant undertook to rebut and overcome it by showing (1) that there was no hole or other similar defect in the pathway, and (2) that, upon the assumption that there was, plaintiff contributed to his own injury by the course he pursued in handling the log by which he was caught. The plaintiff was the only witness who testified to the existence and condition of the hole. Several witnesses who were employed by the defendant at the time, including the boss who selected the ground and superintended the construction of the skidway, testified directly to the contrary. These and other witnesses—about an equal number on either side—testified concerning the propriety of the course pursued by the plaintiff in doing the work, the opinions expressed by them being directly in conflict.

Counsel argue that the testimony of plaintiff as to the existence of the hole was completely rebutted by the testimony of defendant's witnesses, with the result that there was no substantial evidence to sustain the finding of the jury on this issue, and hence the district court should have ordered a new trial. We [1] have held in many cases that the effect and value of evidence is addressed exclusively to the jury, and that their finding thereon, when it presents a substantial conflict, and has been examined and adopted by the trial court upon a motion for a new trial, is not subject to review by this court. Counsel's argument implies the concession that the plaintiff's unsupported statement required a submission of the case to the jury; in other words, that there was substantial evidence to support his case. The fact that several witnesses contradicted him did not render his statement so improbable as to reduce it to a mere semblance or scintilla of evidence insufficient to support a verdict. The court was not authorized to ignore it, for the testimony of a single witness who is entitled to full credit is sufficient for the proof of any fact, except perjury and treason. (Rev. Codes, sec. 7861.) The jury are not bound in any case to decide in conformity with the declaration of any number of witnesses as

against a less number, or against a presumption or other evidence satisfying their minds. (Sec. 8028.) These rules apply as well to the evidence touching the existence of the hole as to the evidence touching the mode adopted by the plaintiff in doing the [2] work. It is true that the evidence as a whole as it appears in type seems to preponderate against the verdict; but, since it presents a substantial conflict, we may not say that the district court abused the discretion lodged in it in such cases to grant or refuse a new trial. (*Schatzlein Paint Co. v. Passmore*, 26 Mont. 500, 68 Pac. 1113; *Campbell v. City of Great Falls*, 27 Mont. 37, 69 Pac. 114; *Mullen v. City of Butte*, 37 Mont. 183, 95 Pac. 597; *Lehane v. Butte Electric Ry. Co.*, 37 Mont. 564, 97 Pac. 1038.)

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

WESTERN MINING SUPPLY CO., APPELLANT, v. MELZNER,
ADMR., ET AL., RESPONDENTS.

(No. 3,293.)

(Submitted October 20. Decided October 29, 1913.)

[136 Pac. 44.]

*Appeal—Insufficient Evidence—Verdict Conclusive, When—
New Trial—Offer of Proof—Briefs—Assignments of Error—
Waiver—Instructions.*

Appeal—Conflicting Evidence—Verdict Conclusive.

1. Where the verdict of the jury is based on conflicting evidence, it is conclusive on appeal.

Same—New Trial—When not to be Granted.

2. The solution of questions of fact being primarily a matter for the jury, a new trial asked for on the ground of the insufficiency of the evidence to support the verdict should be granted only for reasons cogent and convincing.

Same—Offer of Proof—When Rejection Proper.

3. Where documentary evidence is offered, some of which is admissible and some of which is not, the offer may be rejected as a whole.

Same—Briefs—Argument—Assignments of Error—Waiver.

4. An assignment of error based upon an instruction given, the only argument devoted to which in appellant's brief is contained in the words: "As to this instruction we think that this error is the breach of an elementary proposition of law," will be deemed waived for lack of proper argument in support thereof.

Same—Modified Instructions—When Refusal Proper.

5. A trial court cannot be put in error for refusing a suggested modification of an instruction, unless the instruction, as modified, correctly states the law and is applicable to the facts of the case before it.

Appeal from District Court, Silver Bow County; Geo. B. Winston, Judge of the Third Judicial District, presiding.

ACTION by the Western Mining Supply Company against A. B. Melzner, as administrator of John J. Quinn, deceased, and others. From an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

Messrs. Maury, Templeman & Davies, and Mr. Chas. R. Leonard, for Appellant, submitted a brief; Mr. H. Lowndes Maury argued the cause orally.

Mr. James E. Healy and Mr. C. M. Parr submitted a brief in behalf of Respondents; Mr. Parr argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Action in conversion. The defendants prevailed in the lower court, and plaintiff has appealed from an order denying it a new trial.

Plaintiff's claim of title to the property out of which this controversy arose rests upon alleged purchases of it from the Shackleton & Whiteway Construction Company on May 29 and June 26, 1905. Defendant Parr claims the same property by virtue of his purchase of it at sheriff's sale following an attachment levied on July 8, 1905. A more detailed statement of the facts introduces the opinion on the former appeal. (*Western Mining Supply Co. v. Quinn*, 40 Mont. 156, 135 Am. St. Rep. 612, 20 Ann. Cas. 173, 28 L. R. A. (n. s.) 214, 105 Pac. 732.) Upon the last trial the result of the controversy was made to depend

upon the answers to the inquiries: Was there a sale of the property by the Shackleton & Whiteway Construction Company to plaintiff? And, if so, was there such an immediate delivery and actual and continued change of possession as to satisfy the statute of frauds? (Rev. Codes, sec. 6128.) In our consideration of the matters we have not made any distinction between the plaintiff and its immediate predecessors.

While there are items of evidence and circumstances which might have raised a doubt in the minds of the jurors as to whether there was any sale at all by the construction company to plaintiff, we may assume that, as between the parties, there was a valid sale, and the determining question then is: Was there a delivery of possession of the property? The only persons who assumed to know what was done were Suiter, who acted for and on behalf of the construction company, and Farnham, who acted for the plaintiff. These two witnesses told the same story; and, if there was any delivery at all, it occurred on June 26, 1905, and resulted from the delivery by Suiter to Farnham of the key to the warehouse which contained the balance of the property. Upon the former appeal we held that if there was such a symbolical delivery, and the construction company thereafter ceased to exercise any ownership or control, it was sufficient as against the claim of the attaching creditor. (*Western Mining & Supply Co. v. Quinn et al.*, above.) Upon this trial Suiter and Farnham were required to go into details as to their transaction, and in doing so they testified that the warehouse was entered only through the office door and a basement door, the other doors fastening upon the inside, and that the basement was occupied by one Lawlor as a livery barn. Whether Farnham received a key to the basement is not made plain, but in any event, about the time of this supposed delivery, Lawlor caused a new lock to be placed upon the basement door and retained the keys to that lock. Practically all of the machinery, lumber, etc., was housed upon the floor above the livery barn and access to it had only through the office door. According to Suiter and Farnham, that office door was fastened by means of a Yale lock, and it was through the delivery of the key to that

Yale lock by the construction company, acting through Suiter, to the plaintiff, acting through Farnham, that delivery was made, if made at all, on June 26, 1905. If this testimony had been accepted by the jury, a different result would have been reached; but it was not believed by the jury, and it was not contradicted. Lawlor and Parr each testified that there was not any Yale lock on the office door at the time the attachment was levied, and they and other witnesses testified that there was not any evidence that a Yale lock had ever been on the door. Upon this contradictory evidence it was for the jury to determine whether there was in fact any delivery, and the verdict is [1] conclusive against the plaintiff and fully justifies the trial court's ruling. A new trial should not be granted except for [2] reasons cogent and convincing, for all questions of fact presented by the evidence are primarily to be solved by the jury. (*Sutton v. Lowry*, 39 Mont. 462, 104 Pac. 545; *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89.)

Complaint is made of a ruling by the trial court excluding plaintiff's offer in evidence of the minute entry of a meeting of the stockholders of the construction company authorizing Suiter to sell the property; but the record discloses also that [3] plaintiff offered as an entirety six typewritten pages of minute entries which included, with the entry authorizing Suiter to make the sale, entries of other meetings with reference to subjects entirely foreign to the matter before the court. It is the rule in this state, and generally for that matter, that if a party makes an offer of evidence, some of which is admissible and some of which is not, the offer may be rejected as a whole. (*State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035.) Counsel cannot impose upon the trial court the duty to segregate the admissible from that which should not be admitted.

Exception is taken to instruction No. 5 given by the court. [4] All that is said of this by counsel for appellant in that portion of their brief devoted to argument is: "And furthermore, as to this instruction, we think that this error is the breach of an elementary proposition of law." It is the rule in this juris-

diction that an assignment not argued will be deemed waived. (*Mette & Kanne Distilling Co. v. Lowery*, 39 Mont. 124, 101 Pac. 966; *Foster v. Winstanley*, 39 Mont. 314, 102 Pac. 574.) The statement quoted above cannot be dignified with the title "argument," and hereafter assignments thus treated will be deemed within the rule above, for, if counsel for appellant cannot urge some specific reason for their objections, they ought not to expect the members of this court to do that work for them.

It may be readily conceded that the instruction, as given, is erroneous, in the sense at least that it ought not to have been given. It is not founded upon the evidence. Either there was a delivery of the property by the delivery of the key to Farnham or there was not any delivery at all. There is not room for another inference from the evidence. The court submitted to the jury the question whether plaintiff "by some open, visible, and notorious acts of ownership" had taken actual possession of the property. The jurors may have understood the instruction, but after the most careful consideration we are in doubt as to whether we do. If it was the purpose of the instruction to inform the jury that plaintiff must prove, not only an immediate delivery, but an actual and continued change of possession, the language employed would seem to come as nearly concealing that purpose as any that could be selected. If it was the intention to inform the jury that plaintiff might, by some open, visible, and notorious acts of ownership, obviate the necessity of a delivery, it is clearly erroneous as contradicting the statute. (Sec. 6128, above.) However, the suggested modification made by plaintiff at the settlement would not have aided the instruction or made it less objectionable; and it is elementary that a trial court cannot be put in error for re-

jected change of an instruction, unless the instruction, correctly states the law and is applicable to the given case.

of the district court is affirmed.

Affirmed.

JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

IN RE BLACKBURN'S ESTATE. BLACKBURN, APPELLANT,
v. BLACKBURN ET AL., RESPONDENTS.

(No. 3,280.)

(Submitted October 20, 1913. Decided November 1, 1913.)

[137 Pac. 381.]

*Administrators—Husband and Wife—Right to Nominate—
Waiver—Effect—Removal—Evidence—Pleadings—Discretion.*

Administrators—Right to Nominate—Waiver—Effect.

1. The prior right conferred by section 7432, Revised Codes, upon those most interested in an intestate's estate to administer it may be waived; and if waived in favor of another, the renunciation, if fairly procured and freely made, is irrevocable.

Same—Husband and Wife—Rights of Widow.

2. It is the policy of the law that the widow shall control *in limine* the administration of her late husband's estate, and to that end she may either administer it herself or nominate some competent person in whom she places trust and confidence.

[As to the right of a widow to administer the estate of her deceased husband, see note in 93 Am. Dec. 685.]

Same—Right of Widow—Competency.

3. An assertion of claim to property which the other heirs contend belongs to the estate does not render the widow or her nominee incompetent to administer it.

Same—Nomination by Widow—Waiver—When not Irrevocable.

4. Denial of the petition of a widow for the revocation of letters of administration upon the estate of her husband theretofore issued to her stepson at her request, *held*, error where the waiver of her right to administer it herself had not been fairly procured or freely given.

Same—Removal—Pleadings—Sufficiency.

5. In a proceeding in which one primarily entitled to the administration of an estate seeks the revocation of letters issued to his nominee, a strict technical observance of the rules of pleading in the preparation of the complaint was not required, it appearing at the hearing that defendant was not taken by surprise but was fully informed of the nature and scope of the charges made.

Same—Removal—Discretion.

6. Where there is no room for discretion in the district court none may be exercised; hence where the renunciation of her prior right to administer the estate of her late husband had not been fairly procured from the widow, her statutory right had not been exhausted, and it was not within the discretionary power of the court to deny her the exercise of it.

Same—Removal—Insufficient Grounds.

7. Alleged failure by an administrator to include a gold watch and a pair of field-glasses in his inventory of an estate valued at about \$35,000 constituted no valid ground for his removal, where subsequent to the petition for revocation of his letters he filed a supplemental inventory including such articles.

[As to grounds for the removal of an executor or administrator, see note in 138 Am. St. Rep. 525.]

Name—Incompetency—Right of Nomination.

8. A person primarily entitled to administer an estate but rendered incompetent by a want of understanding or integrity is not thereby deprived of the right to nominate someone to act in his stead.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

IN THE MATTER of the estate of Gideon E. Blackburn, deceased. Petition by Hannah A. Blackburn for the removal of Chas. A. Blackburn, as administrator of said estate. From an order dismissing the proceeding, petitioner appeals. Reversed and remanded.

Messrs. Nolan & Donovan, for Appellant, submitted a brief; *Mr. Timothy F. Nolan* argued the cause orally.

The contention of appellant briefly is that section 7450, Revised Codes, carries its own interpretation. It is neither ambiguous nor uncertain. The right of a surviving wife to have letters issued to her and letters issued to any other person revoked is not qualified by any condition, and is not narrowed by any exception. This right is absolute. It is obvious that the question of her right to have letters issued to her nominee revoked can never arise except in the case where she has nominated. Therefore, if argument be made that she has waived her right to letters by nominating another, the statute is made to mean something else than what plain words make it mean. The statute would then be made to read that a surviving wife, when letters of administration have been granted to a child, father, brother or sister, may assert her prior right and obtain letters of administration and have letters before granted revoked, except in a case where she has requested the court to appoint one of those persons named and that person has been appointed. This interpretation of the statute takes from a person an absolute right the legislature, and substitutes therefor a qualification. The California cases which were relied on in the case a so-called estoppel of the appellant, are *In re Estate of Keane*, 68 Cal. 281, 9 Pac. 164; *Estate of Keane*, 56

Cal. 407; *Estate of Kirtlan*, 16 Cal. 161; *In re Silvar's Estate*, 5 Cal. Unrep. 494, 46 Pac. 296; *Estate of Bedell*, 97 Cal. 339, 32 Pac. 323. None of the cases is in point, because in none of them was the applicant proceeding under a section similar to our section 7450, nor is the reason adopted by the supreme court of California in these cases applicable to the case at bar. The conclusion in each of the first three is based purely upon the ground of estoppel, because the petitioner had incurred expense upon the filing of the nomination, and in each case the nominee was left in a position where no reimbursement could be had from the estate that he was nominated to administer. In this case the reason for estoppel does not exist, there being no question of the right of the administrator to be reimbursed, nor any evidence that prior or preferred claims of appellant or any other person will preclude him from being reimbursed for his expense. The last two cases cited above are based upon the *Kirtlan Case*, and rest upon estoppel. In a later case—*Estate of Shiels*, 120 Cal. 347, 52 Pac. 808—all of these cases appear to have been completely overruled, it being there held that a widow may revoke her request before the same is acted upon by the court.

Appellant in asking for the revocation of letters and the issuance of letters to her was and is exercising a right granted by statute. This right is property, and the owner is entitled to use it to the exclusion of others. Her motives may not be inquired into, and cannot affect the merits of this action. (*Bordeaux v. Greene*, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218; *MacGinniss v. Boston & Mont. etc. Min. Co.*, 29 Mont. 428, 75 Pac. 89.) The statutes give the widow the first right to letters of administration. (Sec. 7432, Rev. Codes.) Letters are, therefore, never issued to a child unless the widow has waived her right by failure to apply for letters to herself or by nomination of some other person. The only effect, therefore, of section 7450 is to give the widow the right to demand the administration of the estate even though by her inaction or her positive act she may have previously waived that right. The question of her right under section 7450 can never arise until after there has been an

appointment. "It is the policy of the law that the widow shall have the control of the administration of her husband's estate." (*Dorris' Estate*, 93 Cal. 611, 29 Pac. 244; *Estate of Shiels*, *supra*.) "The law contemplates that those most interested in the administration of an estate shall have the right to nominate some person whom they deem trustworthy to act for them." (*In re Watson's Estate*, 31 Mont. 438, 78 Pac. 702.)

Messrs. Wm. Wallace, Jr., John G. Brown and T. B. Weir, for Respondent, Chas. A. Blackburn, Administrator, submitted a brief; Mr. Brown argued the cause orally.

"Appellate courts are not disposed to set aside an appointment regularly made by the probate judge, except where the latter has abused a wide discretion which the law confides to him." (*Bentley v. Jarrell*, 41 Ind. App. 586, 84 N. E. 548; *Brown v. Dunlap*, 70 Kan. 668, 79 Pac. 145; *In re Rice*, 158 Mich. 53, 122 N. W. 212; *State v. Romjue*, 136 Mo. App. 650, 118 S. W. 1188; *In re Scott*, 76 Neb. 28, 106 N. W. 1003, 107 N. W. 1004; *Davenport v. Davenport*, 68 N. J. Eq. 611, 6 Ann. Cas. 261, 60 Atl. 379; *Butcher v. Kunst*, 65 W. Va. 384, 64 S. E. 967.) The statute gives a preference to males over females. (Secs. 7433, 7434, Rev. Codes.) This statutory ruling is followed in many decisions which have also placed the preference with males upon the ground that courts prefer to have someone of business experience. Further, courts very properly try to avoid appointing claimants (even widows—*Davis' Estate*, 48 Misc. Rep. 489, 96 N. Y. Supp. 1106) whose interests are conflicting or apt to conflict with those of the estate. (*In re Rathgeb's Estate*, 125 N. D. 1010; *In re Wallace*, 68 App. Div. 649, 74 *Bauquier's Estate*, 88 Cal. 302, 26 Pac. 178, 532; *her*, 148 Mass. 247, 19 N. E. 370; *Marks v. Marks*, 9, 62 Pac. 488; *Bean v. Pettengill*, 57 Or. 22, *re Sharpless*, 209 Pa. 69, 57 Atl. 1128.)

ended that hostility shown toward Hannah A. the administrator should entitle her to have an extended search has failed to disclose to us

a single case supporting this contention, and we have found numerous holding expressly to the contrary. (*Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113; *In re Waterman's Estate*, 112 App. Div. 313, 98 N. Y. Supp. 583; *In re Job's Estate*, 28 Pa. C. C. 336; *Rementer's Estate*, 28 Pa. C. C. 638; *Randle v. Carter*, 62 Ala. 95.)

Appellant having executed her waiver and the court having acted upon it, the waiver is complete and she is not entitled to administer the estate as against the administrator so designated and appointed. Statutory rights may be waived, and persons, upon well-defined principles of estoppel, are not allowed to blow first hot and then cold in their dealings with courts and the law. This doctrine has been recognized and enforced in decisions holding that a failure by one entitled to apply for letters of administration within a reasonable time is held as a waiver of the statutory right, and unless very good cause is shown, the application will be refused. (*In re Crites' Estate*, 155 Cal. 392, 101 Pac. 316; *McColgan v. Kenny*, 68 Md. 258, 11 Atl. 819; *Rodes v. Boyers*, 106 Tenn. 434, 61 S. W. 776; *Briggs v. Probate Court*, 23 R. I. 125, 50 Atl. 335 *Jewett v. Turner*, 172 Mass. 496, 52 N. E. 1082; *In re Sprague's Estate*, 125 Mich. 357, 84 N. W. 293; *Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828.)

Inventories are purely statutory and no permission of court is necessary. (Sec. 7493, Rev. Codes; *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 75 S. W. 866.) The statute expressly provides that further inventories may be filed, and makes no requirement of first obtaining leave to file. (Sec. 7500.) Now, when the reason for the rule ceases, the rule ceases. So it is in this case, when the inventory is filed and within proper time, the reason for removal on this ground ceases. (*Cosby v. Weaver*, 107 Ga. 761, 33 S. E. 656.) "The failure to file an inventory by the time specified amounts technically to an official delinquency, or breach of the condition of the administrator's bond, which may prove serious, but rarely can, if upon citation the executor or administrator performs his duty or shows good cause why an inventory should be deferred or dispensed with." (18

Cyc. 206.) It is all within the sound discretion of the court and revocation should be refused where sufficient excuse is offered, as was done here. (*Moore v. Mertz*, 38 Tex. Civ. App. 283, 85 S. W. 312; *Mulford v. Mulford* (N. J.), 53 Atl. 79; *Harris v. Seals*, 29 Ga. 585; *Andrews v. Carr*, 2 R. I. 117; *Dowdy v. Graham*, 42 Miss. 451.) So a supplemental statement describing the property omitted is sufficient though not filed as an inventory (*Ackerson v. Orchard*, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605); or where an inventory is actually filed as in the case here—and the estate does not lose thereby. (*Clancy v. McElroy*, 30 Wash. 567, 70 Pac. 1095; *Chadbourn's Estate*, 15 Cal. App. 363, 114 Pac. 1012.) In addition to the statutory authority we find that an inventory subsequently filed is valid. (*Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667.)

Messrs. Maury, Templeman & Davies submitted a brief in behalf of Respondents other than the administrator; *Mr. H. L. Maury* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Dr. Gideon E. Blackburn, of Butte, died intestate on March 24, 1912, leaving some estate, and surviving heirs as follows: Hannah A. Blackburn, his wife, Charles A. Blackburn, a son, and two daughters. On March 29, 1912, Charles A. Blackburn filed in the district court of Silver Bow county a petition for letters of administration of the estate, and also filed a writing signed by the widow, wherein she formally waived her right to such letters and requested his appointment. In the petition it is recited that the estate and effects in respect of which letters of administration are asked do not exceed the value of \$5,000, consists of office and household furniture, libraries, and miscellaneous stocks and bonds of unknown value. The petition came on for hearing in due course, and at the hearing the petitioner testified that, so far as he then knew, the estate was not to exceed \$5,000; of this, \$2,900 was represented by the remainder being stocks, bonds, and other interests.

The petition was granted, and Charles A. Blackburn has since acted as administrator. On June 5, 1912, he filed an inventory and appraisement, wherein he failed to list a gold watch and a pair of field-glasses as part of the estate, but did list as the property of said estate a large number of securities and various parcels of realty claimed by the widow as her individual property. By this inventory it was made to appear that the estate was of the value of \$34,996.07. On June 7, 1912, the widow filed her petition, alleging, in substance, that the administrator had willfully and fraudulently failed and refused to list the watch and field-glasses above mentioned, and had converted the same to his own use, and that, with the intent to involve the estate in useless and unnecessary litigation, he had listed the securities and realty above referred to, belonging exclusively to her. On the following day the administrator filed a supplemental inventory, listing the watch, the glasses, a revolver, and an additional piece of real estate; so that, as finally presented by the two inventories, the appraised value of the estate is made to appear at \$35,558.07.

To the petition of the widow two answers were filed: One by the administrator, and the other by H. L. Maury on behalf of Daisy I. O'Neill and Sister M. Florentia, the daughters of deceased; the answer of the daughters, praying "that no relief be granted to Mrs. Hannah A. Blackburn," denies generally the allegations of her petition, including her widowhood; denies that the watch and glasses are of any value; alleges that she is not related to them, and that their mother is still alive. The answer of the administrator puts in issue the widowhood of the petitioner; explains the omission of the watch and glasses from the first inventory; denies the charges of fraud, waste, or intent to involve the estate in unnecessary litigation, or that any litigation he will bring will be in bad faith; and alleges that any claim he may assert or attempt to enforce will be under the permission of the court, for the sole use and benefit of the estate. By way of further answer the administrator pleads the waiver and request executed by the widow, and alleges that in consequence thereof,

and of expenditures by him of money in the care of the estate, "she is not entitled to now assert any rights which she may have or claim, as widow, to have letters of administration issued to her."

In reply to the answer of the administrator, the widow admits the execution of the waiver and request filed March 29, 1912, and alleges that the same was made by her "upon the solicitations of Charles A. Blackburn and the advices of John G. Brown, his attorney, and the representations of friendliness on the part of the said Charles A. Blackburn" toward her, and that since the issuance of letters of administration to him, he has become and now is hostile to her and to the best interests of the estate "and dishonest and untrustworthy, as more fully appears from the petition herein on file." The matter was heard before the district court of Silver Bow county, the Honorable Jeremiah J. Lynch, judge presiding; and, upon the proceedings had, including the testimony taken, an order was made by which the petition of the widow was denied and the proceeding dismissed. From that order this appeal is taken.

The appellant contends that the petition should have been granted, because the widow is vested by the statute with a prior right to administer her late husband's estate, which cannot be affected by her renunciation; because the circumstances under which the administrator secured her renunciation were such that it ought not be held effective in view of his present attitude toward her interests, and because the evidence establishes that he is not a fit and proper person to have control of the estate.

1. The position that the widow is entitled, notwithstanding [1] her renunciation and the appointment of her nominee, to have him removed and letters issued to her whenever she so elects is grounded in the assumption that such is the unmistakable meaning of section 7450, Revised Codes. Notwithstanding the contention of appellant that this section is so clear as to be self-interpreting, its meaning cannot be ascertained from its language alone. Taken by itself—all collateral light excluded—we are without any information as to what right is recognized,

what the character of that right is, or how that right may be asserted; all we can know is that whatever the right and however claimed, it would be unavailing where letters have been issued to the mother, since she is not mentioned among those as against whom it may be asserted. Such a conclusion, so manifestly contrary to the general plan and purpose of the statute, is of course untenable; but it serves to show that, to give the statute any intelligible meaning, we are required to construe it in connection with other provisions to which it stands in obvious relation. When this is done, a result is reached different from that upon which the appellant insists.

“Administration of estate of all persons dying intestate must be granted to some one or more of the persons hereinafter mentioned, * * * in the following order: 1. The surviving husband or wife, or some competent person whom he or she may request to have appointed. 2. The children. 3. The father or mother. 4. The brothers. 5. The sisters. * * * ” (Sec. 7432, Rev. Codes.) “Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuance of letters to themselves” (sec. 7444); but when letters have been granted to any other person than the surviving spouse, child, parent, brother, or sister, “any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration” by presenting to the court an appropriate petition (sec. 7447), on which a citation to the administrator shall issue (sec. 7448), and a hearing be had (sec. 7449). “The surviving husband or wife, when letters of administration have been granted to a child, father, brother or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right and obtain letters of administration and have letters before granted revoked in the same manner prescribed in the three preceding sections.” (Sec. 7450.) The primary purpose of these provisions is, of course, to confer a

prior right of administration upon those most interested in the estate, to signify the legislative will concerning the order of priority, to provide a method by which it may be once asserted in every case, and to authorize its assertion by nomination in certain instances. There is no warrant for the inference that the legislature intended the right to continue after it had been once freely exercised; for, valuable though it is, the advantage conferred is solely for the benefit of the persons named, and involves no public purpose. It may therefore be waived (sec. 6181, Rev. Codes), and the effect of its waiver cannot be different from the effect of a waiver in other cases. This result, derived from our statutory provisions alone, is supported by an abundance of authority, and compels us to hold that if the renunciation and request of appellant, because of which the administrator was appointed, was fairly procured and freely given, she has exercised her prior right, and no longer has any to assert. (*In re Estate of Moore*, 68 Cal. 281, 9 Pac. 164; *Slay v. Beck*, 107 Md. 357, 68 Atl. 573; *Estate of Keane*, 56 Cal. 407; *In re Evans' Estate*, 117 Mo. App. 629, 93 S. W. 922; *Estate of Wooten*, 56 Cal. 322; *Stocksdale v. Conaway*, 14 Md. 99, 74 Am. Dec. 515; *In re Bedell's Estate*, 97 Cal. 339, 32 Pac. 323; *Estate of Kirtlan*, 16 Cal. 161.)

2. It is, however, the policy of our law that the widow shall [2] control *in limine* the administration of her late husband's estate. (*Shiels' Estate*, 120 Cal. 347, 52 Pac. 808; *Dorris' Estate*, 93 Cal. 611, 29 Pac. 244.) To that end she is authorized to either administer it herself, or to nominate some person in whom she places trust and confidence to administer it for her. (*In re Watson's Estate*, 31 Mont. 438, 78 Pac. 702.) No condition or limitation is imposed upon her choice save that she or [3] the person she nominates be competent; nor does the fact that she asserts claim to property which the other heirs contend belongs to the estate render her or her nominee incompetent. (Rev. Codes, sec. 7436; *Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828; *Brundage's Estate*, 141 Cal. 538, 75 Pac. 175; *Estate of Bauquier*, 88 Cal. 302, 26 Pac. 178, 532.) In the instant case, considerations touching the burden of proof in any action affecting

the title to the disputed property might easily render the attitude of the administrator a matter of grave importance to the widow; and she was entitled to retain, until lost by her voluntary act, such legitimate advantage as might arise from her right to control the administration. Therefore, her due was absolute frankness on the part of the person seeking her nomination; and if he, pending her assent to his appointment, so demeaned himself as to deceive or lull her into a false security concerning his attitude, and she, believing him friendly to her and not hostile to her claims, waived her right and assented to his appointment to her disadvantage, it cannot be said that her waiver was fairly procured or freely given.

The voluminous record before us tends to show that the claim asserted by the widow to certain stocks, bonds, and real estate which were not mentioned in the petition for letters, but which have been listed in the inventory, is not wholly baseless. The evidence bearing upon the attitude of the administrator [4] toward her and her claims comes entirely from her and from him. Prior to his appointment, she says, he had been kind and affectionate to her, and she was depending upon him. On the day after the funeral of Dr. Blackburn she and the administrator had gone through the boxes at the bank and he had seen her remove some deeds, and had at her request erased the name of Dr. Blackburn from one of the boxes, and had put hers in its place. He claimed he knew that the stocks and bonds in the Miners' Savings Bank belonged to her, and he gave her to understand that there was no question about it. When they were going up the steps to court the morning he was appointed administrator, she said, "Now, Charley, there is no question about my bonds and stocks at the Miners' Bank, and I can have them?" and he said, "Yes, Mrs. Blackburn, I'll see to it right away"; "but he talked very different after he was appointed. Prior to his appointment he had shown no disposition to sue me or bring my property in question at all; none whatever." Again, touching the real estate: "Charles Blackburn has talked to me and discussed with me my title to the property. He saw all the

papers before he was appointed administrator, and after he was appointed he said, in the presence of my sister, that there was no question of my ownership of the real estate. * * * I cannot say how many times he made that statement, but he talked that way right along. He stated that more than once. I could tell you specifically the conversation we had about the Gallatin Addition, and it was this: I owed \$2,000 on the Gallatin Addition, and the interest was 10 per cent, and I wanted to stop the interest; so I paid my \$2,000. Charley was up in the room one day, and I said, 'Now, Charley, I am going to pay my \$2,000; as administrator you are not going to present any claim whatever to my Gallatin Addition?' and he said, 'No, Mrs. Blackburn, that is absolutely yours.' * * * Charles Blackburn testified to the value and nature of the property belonging to the estate at the time he obtained his letters of administration. He at that time, as I remember, said there was no real estate in the estate, and that the property consisted of mining stock, office furniture, and book accounts, and I do not remember any more. * * * He did not mention the Tuolumne stock at the Miners' Bank as belonging to the estate, nor the South Park Mining & Realty Company stock as belonging to the estate, nor the Independent Telephone bonds as belonging to the estate. As I remember it, he stated the value of the estate was from \$5,000 to \$7,000, or words to that effect—that the estate was not over \$7,000. He said there was no real estate. Before he made these declarations under oath he had not only examined the papers of the estate, but he had seen my papers also. * * * As we came down from Judge Donlan's court I said something about, 'Now, Charley, I will go and get my things,' and you [Mr. Brown] said, 'Oh, Mrs. Blackburn, Charley is under bond now,' and I said, 'Mr. Brown, those things don't belong to the estate; they belong to me.' * * * What I wanted was my Tuolumne stock. Charley had promised to go over there to the bank as soon as he was appointed. * * * And this conversation was right after the hearing at which he testified in Mr. Brown's presence that the estate was worth something like

\$5,000." The deeds which she had removed from the bank boxes in the presence of the administrator ran from her to Dr. Blackburn; these she destroyed, claiming that they had been executed to avoid administration in case of her death, but never delivered. In regard to that she testified that Charles Blackburn knew of her intention to destroy them, before it was done, and both he and Mr. Brown knew of their destruction after it was done, and before the appointment of the administrator. The waiver was signed on March 29, 1912. At that time she did not have, and had not had, any counsel. Concerning this, in response to inquiries by Mr. Brown, she testified: "You offered your assistance as attorney; otherwise I would have had an attorney to protect me. But Charley brought you to my house, and you offered your services, and I, as a professional man's wife, did not consult any other attorney until Charles Blackburn was appointed administrator, and then I said to you, 'Are you my attorney?' and you did not know about it."

The testimony of the administrator is as remarkable for what it does not contain as for what it does contain. On direct examination he gave no testimony in denial of the foregoing or concerning his attitude before and after administration, touching her and her claims, except that he had consulted counsel regarding the stocks, bonds, and real estate, and had listed them as the property of the estate on the advice of counsel. He also said: "I first knew the deeds had been destroyed when the matter was testified to here in court. * * * I can't recall whether Mrs. Blackburn told me she was going to destroy them; my recollection is that she did tell me that her intention was to destroy them." On cross-examination he said he could not tell when he first consulted counsel about the real estate, except that it was after his appointment. "I did not tell him about those deeds in the bank and their removal by Mrs. Blackburn before I petitioned for letters of administration. I knew about those deeds before I petitioned for letters of administration, but did not disclose the fact to my counsel. I don't know why I didn't, but it probably escaped me. I don't know whether I

disclosed that fact to him before I secured letters of administration or not. * * * I testified at the hearing of the application for letters of administration * * * that the estate did not, to the best of my knowledge, own any real estate. * * * At that time I knew of those deeds which Mrs. Blackburn had removed, and had known of them some ten days before, but began to see the light in regard to this real estate as soon as I had put the facts up to my counsel. I cannot say what date that was, but I am quite sure it was after my appointment. * * * I first learned of those bonds being down in the Miners' Savings Bank before Dr. Blackburn was buried. * * * I took this matter up with my counsel, and got advice from him shortly before I was appointed, I think. I am not sure that I talked that matter over with him about it before my appointment. I am not positive whether I did or not. * * * Upon the advice of my counsel, it was true of my own knowledge that this was the property of the estate. It was my own knowledge that that was property of the estate, and Mrs. Blackburn was endeavoring to get it for her own use. * * * I remember Mr. Brown in my presence, and within a few minutes after I was appointed administrator, telling Mrs. Blackburn that those securities had to be turned into the estate. He told Mrs. Blackburn that standing in front of Judge Lynch's courtroom on Granite street. That was a few minutes after I was appointed. At that time Mrs. Blackburn said, 'Well, now, you can go right down and get my stocks and give them to me, can't you?' or 'Get my bonds and stuff at the Miners' Savings Bank,' and Mr. Brown said, 'Why, that stuff must undoubtedly go through the estate.' * * * I presume Mrs. Blackburn addressed the remark, 'Go down and get my bonds or stocks,' to me. All three of us were there. I had not previously agreed to do that. In a general way the ownership of the securities at the Miners' Savings Bank had been discussed between myself and Mrs. Blackburn. I did not tell her as late as the morning of my appointment that I would go down and get those things for her as soon as I was appointed. In this general con-

versation that I had about the ownership, I did not agree with her, that she was the owner. I did not say she was not. I took the position that until I had been more fully advised in the premises and had seen the securities, and had had an opportunity to investigate the conditions under which they had been left there, and the physical appearance of them, that it was not up to me to decide as to whose they were. I don't know whether I told her that at any time before I was appointed administrator or not. As to telling the court that when I was under oath, I wasn't asked about it. * * * I consulted with Mr. Maury in regard to this proceeding. He is not my attorney in this case. I have not consulted with him quite as frequently as I have with Mr. Brown. I retained him on behalf of Sister M. Florentia and Daisy I. O'Neill. I do not feel that I am controlling their case. I do not feel that I am their representative. They have not communicated directly with Mr. Maury or Mr. Templeman, to my knowledge. As far as I know, they have communicated with me."

Counsel insist that the zeal of the administrator in getting together all the property of the estate is no fault or ground for removal. Assuredly not, but that is beside the mark. The question is whether the waiver of the widow and her request for his appointment was fairly procured and freely given. We think her testimony shows that it was not, and his serves only to confirm that impression. He received her consent to the administration by him of an estate of a certain character, estimated at not to exceed \$5,000 in value, and which did not claim any of the property in dispute; she never did consent that he should administer an estate of a different character, valued at \$35,558.07, three-fourths of which consists of property claimed by her as her own. Before his appointment she undoubtedly believed, and had reason to believe, that his attitude toward her claims was not adverse; whether this arose from what he said or failed to say is of no importance. (*Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950.) His duty under the circumstances was candor toward her and toward the court; he should have

told her that her claims might have to be questioned, and he should have given the court, in his petition for letters and in his testimony at the hearing thereof, all the information he then had in regard to the matter; instead of this, he evaded to the point of deception, if he did not expressly deceive. Deception cannot be countenanced in matters of this kind. (*Lutz v. Mahan*, 80 Md. 233, 30 Atl. 645; *In re Farnham's Estate*, 41 Wash. 570, 84 Pac. 602.) At the time he filed the inventories, at the time he filed his objection to her petition, and at the time he testified on this hearing, no material facts had come to his knowledge which were unknown to him at and before the time he received his appointment as administrator; yet he now questions her widowhood, is certain that none of the property is hers, charges her with endeavoring to convert the property of the estate to her own use, and causes counsel to appear and join in his attack on behalf of the other heirs. His offense is not in listing the property in question, but in the exhibition of an attitude so generally hostile to the widow as to warrant the inference that he had held it before his appointment, but carefully screened it from her until his position should be assured.

It is urged, however, that there was no sufficient allegation in [5] the appellant's "pleading" in the way of excuse or avoidance of her waiver and request. We do not think that in a proceeding of this kind the parties should be held to a strict and technical observance of the rules of pleading. It is sufficient if the administrator was informed, by the allegations of the widow, of the nature and probable scope of her complaint, and that he was so informed is evident from the fact that no surprise was claimed, that he testified concerning the matter so far as interrogated, and that the subject was canvassed without any objection touching the sufficiency of the "pleading."

Some remarks are also made about the discretion of the district court and the willingness of the administrator to have the disputed questions of title settled by an agreed statement of [6] facts. Discretion in the trial court arises only when there is room for it. From the testimony, which presents no substan-

tial conflict, it appears that the widow's renunciation of her right to administer was not fairly procured nor freely given; her prior right has therefore not been exercised. It is not within the power of any court to deny her the exercise of that right. As to the agreed statement of facts, the record does not show what the administrator proposed to agree to; hence we cannot tell whether his willingness to agree is a circumstance in his favor or not.

3. An examination of the record and of the authorities convinces us that the failure of the administrator to include the [7] watch and glasses in his first inventory constituted no ground for his removal. As an impeachment of his integrity it was frivolous; but it illustrates the state of feeling and the lack of confidence on the part of the widow toward her nominee.

We have said above that the widow is not incompetent merely [8] because of her claims to the property in dispute; whether her conduct was such as to establish a want of understanding or integrity so as to render her incompetent we do not decide. But, competent or not, she still has her right of nomination. (*McLean v. Roller*, 33 Wash. 166, 73 Pac. 1123; *Stevenson's Estate*, 72 Cal. 164, 13 Pac. 404; *Bedell's Estate*, *supra*.)

The order appealed from is reversed, with directions to the district court of Silver Bow county to revoke the letters of administration heretofore issued to Charles A. Blackburn, and to grant the petition for the appointment of the appellant, unless the court shall find, from the evidence taken or which may be taken at a further hearing, that she is incompetent for want of proper understanding or integrity, in which event to appoint such competent person as she may nominate.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied December 24, 1913.

McFARLAND, RESPONDENT, v. WELCH, APPELLANT.

(No. 3,287.)

(Submitted October 21, 1913. Decided November 1, 1913.)

[136 Pac. 391.]

***Contracts—Preventing Completion—Complaint—Insufficiency—
Remedies—Election—Measure of Damages—Instructions.*****Contracts—Preventing Completion—Complaint—Insufficiency.**

1. Complaint in an action to recover on a contract which plaintiff claimed he was prevented by defendant from fully performing, *held* insufficient for lack of allegation that defendant's interference was wrongful, or a showing that his failure to complete the contract was excusable.

Same—Remedies—Election.

2. Where full performance of a contract is prevented by the wrongful interference of one party, the other may treat such wrongful act as a breach of the contract and at once sue for damages arising from loss of the benefits which would reasonably have followed a complete performance on his part, showing that he was injured by the breach, and the extent of his injury; or treat the contract as at an end and sue upon a *quantum meruit* for the part already performed.

Same—Breach—Nominal Damages, When.

3. Mere breach of a contract does not, in the absence of allegation showing injury and intent thereof, warrant recovery for more than nominal damages.

Same—Measure of Damages—Failure to Instruct—Reversible Error.

4. Failure to instruct the jury as to the measure of damages recoverable in an action on a contract is reversible error.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by Ambrose McFarland against J. J. Welch. Judgment for plaintiff and defendant appeals from it and an order denying him a new trial. Reversed and remanded.

Cause submitted on briefs of counsel.

Messrs. Chas. H. Hall and A. N. Whitlock, for Appellant.

Messrs. Welling Napton and V. S. Kutchin, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In plaintiff's complaint as originally presented he alleged that in May, 1910, he entered into a contract with defendant

by the terms of which he agreed to perform work and labor for defendant in skidding, hauling, and loading logs and ties, and in scaling the logs, for which defendant agreed to pay \$7 per thousand for the work so done upon the logs, sixteen cents for each tie so handled, and \$25 per month for scaling, amounting in the aggregate to \$1,320; that he commenced work immediately, "and afterward, to-wit, on the 8th day of December, 1910, completed the contract so far as the terms and conditions were to be performed by plaintiff"; that no part of the contract price had ever been paid except the sum of \$420; and that there remained due \$900, for which amount judgment was demanded.

The answer denies generally all the allegations of the complaint; pleads an entirely different contract, an abandonment of it by plaintiff, and a counterclaim for \$688.72 for goods, wares, merchandise, and cash furnished to plaintiff at his special instance and request. All of the affirmative allegations in the answer and counterclaim were put in issue by reply. Upon the trial plaintiff amended his complaint by adding after the word "plaintiff" in the portion quoted above the following: "To this date, and would have entirely performed the same had he not been prevented by act of this defendant." The trial resulted in a verdict and judgment in favor of plaintiff for \$500, and defendant appealed.

The complaint as amended does not even charge that plaintiff [1] was prevented from completing his contract by any *wrongful* act of defendant. If the act was rightful, plaintiff cannot complain upon any theory. If he seeks to justify his failure to complete the work under the contract, he must set forth the facts and circumstances constituting such excuse, to the end that the court may determine whether the acts of which complaint is made were wrongful, and therefore constitute an excuse, or whether they were rightful, and justify the defendant. These rules are elementary, and their enforcement necessary in order that issues may be framed for trial, and the defendant apprised of the charge he is called upon to meet.

There is not any conceivable theory upon which the complaint, as it now stands, can be construed into the statement of a cause of action. If it be assumed that it was the purpose [2] of the pleader to charge a wrongful interference by defendant, and that that was plaintiff's theory of his case, then he had at least two remedies available to him:

(1) He could treat the defendant's wrongful act as a breach of the contract, and sue at once for damages arising from his having been prevented from reaping all the benefits and advantages which would reasonably follow a complete performance on his part, and the measure of his recovery would be the difference between the contract price and the expense to him of doing the work. (Sec. 6048, Rev. Codes.) But plaintiff did not choose this alternative. He does not state what portion of the entire contract he had performed, what amount remained to be done, what, if anything, is due to him for the portion already performed, or what, if any, profits or advantages to him were within the reasonable anticipation of the parties when the contract was entered into. Of course, if plaintiff could not reasonably expect any profit or advantage from completing the enterprise, he was not injured by the interruption. He does not allege any [3] breach by defendant; but, if he did, that of itself would not warrant recovery for more than nominal damages. (*Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109.) He must disclose that he was injured as the consequence of such breach and the amount or extent of such injury. (*Mergenthaler Linotype Co. v. Kansas State Printing Co.*, 61 Kan. 860, 59 Pac. 1066.)

(2) He could treat the contract as at an end, and sue upon a *quantum meruit* for the work already done (*Keyser v. Rehberg*, 16 Mont. 331, 41 Pac. 74); but he did not do so. His failure to state what amount of the contract work he had performed renders it impossible to determine the extent to which he should recover.

That a party who has been wrongfully prevented from completing his contract has his election between the two remedies

just considered, the authorities all agree (3 Page on Contracts, sec. 1569; 9 Cyc. 688); but some go further and add a third alternative, *viz.*: He may stand by in readiness to perform until the term of the contract has expired, and then sue upon the contract. This third rule is recognized in *Isaacs v. McAndrew*, 1 Mont. 437, in *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773, and in some other authorities. Whatever may be said of it, plaintiff in this instance has not sought to invoke it. He does not allege that the term of his contract had expired when his action was instituted; on the contrary, the filing mark upon his complaint discloses that he commenced this proceeding immediately after the alleged interference. He never can invoke it, for his testimony discloses that, according to his theory, his contract had not expired—indeed, that the time for performing a substantial part of it had not arrived.

The foregoing observations presuppose an entire or indivisible contract, and, in so far as any theory of the plaintiff can be adduced from his complaint, it is that the agreement upon which he relies is an entire contract. Of course, if the contract was severable, or if plaintiff was seeking relief under section 4926, Revised Codes, he would be compelled, in the one instance, to disclose the proportion of the work performed, and, in the other, the matters contemplated by the section of the Code, just mentioned.

In its instructions the trial court failed altogether to advise the jury of the measure of plaintiff's recovery in the event that [4] he prevailed. Ordinarily, this would constitute reversible error, for it leaves the jury to determine the amount of their verdict by mere guesswork, and in this present instance the amount returned by the jury only serves to emphasize the fact that the jurors were at sea without chart or compass. There is not any evidence to justify a verdict for \$500. It does not respond to plaintiff's demand, nor to his proof; but the trial court's failure was fully justified, for it was impossible to determine from the amended complaint the theory of plaintiff's case or the

amount to which he was entitled, if entitled to recover at all. But we are disposed to afford plaintiff an opportunity to state a cause of action, if he can do so by amendment or otherwise.

The judgment and order denying defendant a new trial are reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

WINE, RESPONDENT, v. NORTHERN PACIFIC RAILWAY CO., APPELLANT.

(No. 3,294.)

(Submitted October 22, 1913. Decided November 1, 1913.)

[136 Pac. 387.]

Waters and Watercourses—Railroads—Surface and Flood Waters—Removal of Obstruction—Liability for Damage.

Railroads—Watercourses—Ice Gorges—Removal—Liability for Damage.

1. While a railroad company must exercise the highest degree of care to keep its track and roadbed safe, it may not in so doing, even in cases of emergency, injure the property of an adjoining owner without rendering itself liable for the resultant damage; hence, refusal of an instruction that if removal of an ice gorge in a river near defendant's roadbed was necessary to protect it and a bridge crossing the stream, the plaintiff could not recover damages for the flooding of his premises occasioned thereby, was proper.

Same—Flood and Surface Waters.

2. Where water is forced out of the channel of a stream by an ice gorge, its character—whether surface or flood water as defined in *Fordham v. Northern Pac. Ry. Co.*, 30 Mont. 421—and the extent of the right of persons affected by its presence to deal with it, are dependent upon the facts as they are made to appear in each particular case.

Same—Watercourses—Removal of Obstruction—Liability for Damage.

3. Waters forced over the banks of a river by an ice gorge which, upon removal of the obstruction by defendant railway company, returned to the channel and became part of the torrent which inundated plaintiff's land lying below, were flood and not surface waters, and therefore, under the doctrine announced in the *Fordham Case*, *supra*, defendant was liable for the damage caused to plaintiff, irrespective of any question of negligence.

[As to the right of one land owner to accelerate or diminish the flow of water to or from the lands of another, see note in 85 Am. St. Rep. 707.]

Appeal from District Court, Broadwater County; W. B. C. Stewart, Judge.

ACTION by Joseph R. Wine against the Northern Pacific Railway Company. From an adverse judgment and order, defendant appeals. Affirmed.

Messrs. Gunn & Rasch, for Appellant, submitted a brief; Mr. E. M. Hall, of Counsel, argued the cause orally, citing: *Cairo etc. R. Co. v. Houry*, 77 Ind. 364; *Lamb v. Reclamation Dist. No. 108*, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; *Rex v. Commissioners*, 8 Barn. & C. 355; *McDaniel v. Cummings*, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795; *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113; *Harvey v. Northern Pac. Ry. Co.*, 63 Wash. 669, 116 Pac. 464; *Gulf etc. Ry. Co. v. Clark*, 101 Fed. 678, 41 C. C. A. 597; *Johnson v. Chicago etc. Ry. Co.*, 80 Wis. 641, 27 Am. St. Rep. 76, 14 L. R. A. 495, 50 N. W. 771; *McCoy v. Board of Directors*, 95 Ark. 345, 129 S. W. 1097; *Waffle v. New York Central R. Co.*, 53 N. Y. 11, 13 Am. Rep. 467; *Missouri Pacific Ry. Co. v. Keys*, 55 Kan. 205, 49 Am. St. Rep. 249, 40 Pac. 275.

Mr. J. R. Wine, Jr., for Respondent, submitted a brief and argued the cause orally.

The waters of the Missouri river, which were backed up by the lower gorge and held on the lowland, to the west of defendant's embankment, formed a continuous body with the Missouri river, and were a part thereof, and governed by the rule of law announced in the case of *Fordham v. Northern Pacific R. Co.*, 30 Mont. 421, 104 Am. St. Rep. 729, 66 L. R. A. 556, 76 Pac. 1040. (See, also, *Riddle v. Chicago R. I. & P. R. Co.*, 88 Kan. 248, 128 Pac. 195.)

The placing of an obstruction in a natural watercourse in such a way as to cause the water to leave the channel and flood and injure the lands of a riparian owner is a trespass to said lands, rendering the person responsible for the obstruction liable for

the damage suffered, and in such an action it is not necessary to either plead or prove negligence. (See 28 Am. & Eng. Ency. of Law, 551 *et seq.*; 38 Cyc. 994 *et seq.*) Nor is the intent with which the trespass is committed material. (*Id.*; see, also, *Staton v. Norfolk & C. R. Co.*, 111 N. C. 278, 17 L. R. A. 838, 16 S. E. 181.) One who wrongfully places an obstruction in a natural watercourse, thereby diverting the flow upon the lands of another, creates a nuisance *per se*. (*Allen v. Stowell*, 145 Cal. 666, 104 Am. St. Rep. 80, 68 L. R. A. 223, 79 Pac. 371; 29 Cyc. 1155, 1178.)

The flooding of private lands is a taking within the constitutional prohibition. The leading case on this subject is that of *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166, 20 L. ed. 557. See, also, 7 Rose's Notes to United States Reports, p. 648 *et seq.*, where the author has collected and digested the cases in which the *Pumpelly Case* has been referred to and approved.

A railroad company, as such, has no more right or authority to flood another's lands than a private individual. (*Union Pac. Ry. Co. v. Dyche*, 31 Kan. 120, 1 Pac. 243; *Jenkins v. Wilmington & W. R. Co.*, 110 N. C. 438, 15 S. E. 193.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages alleged to have been caused to the lands of plaintiff by the wrongful act of the defendant. The plaintiff had verdict and judgment. The defendant has appealed from the judgment and an order denying its motion for a new trial.

The plaintiff is the owner of lands lying on both sides of the Missouri river, a short distance below the point where the defendant's line of railway crosses it, near Townsend, in Broadwater county. The general course taken by the river in this locality is from the southwest to the northeast. The course of the railway is from the southeast toward the northwest, crossing the river nearly at right angles. For the distance of more than a mile from the river to the southeast, the lands on either side

of the railway are lowlands, elevated only a few feet above the stream at its ordinary stage. Beyond the river to the northeast the condition is the same. Plaintiff's residence, with appurtenant out-buildings, orchard, garden, and meadow, is situated on a portion of his lands lying on the southeast bank. The main body of his lands lies along the opposite bank. The line of the railway approaches the bridge from the southeast by means of an embankment, which increases in height, from a few inches near Townsend, to about eight feet where it reaches the bridge. This embankment was constructed many years ago when the railway was built. It has no substantial openings to permit the escape of water which may accumulate on the side toward the southwest from an overflow of the river or from precipitation. Such accumulations can escape only by following the line of the embankment to the river at the bridge. It is not unusual that, during the spring thaws when the ice leaves the river, gorges are formed which, varying in size and duration, impede the flow of the river causing temporary overflows of portions of adjacent lowlands. On March 4, 1910, such a gorge formed at a point about 350 yards above the defendant's bridge. At the same time a second gorge formed below the bridge nearly opposite the residence of the plaintiff. The upper gorge caused an overflow of water from above, which, being held in check by the volume detained by the lower gorge, accumulated on the upper side of defendant's embankment, rising in places approximately to its crest and threatening its safety. The general level of the stream and the flood water was then stationary at about five and one-half feet above the normal stage, but was not sufficiently high to flood any substantial portion of plaintiff's lands on either side of the river. On March 5 a strong wind began to blow from the west, driving the water against the embankment so that it began in places to wash out the material from under and between the ties. Having concluded that a removal of the upper gorge would permit most of the flood waters to escape by the main channel of the river and that the embankment would thus be relieved from danger, the employees of defendant, though they

knew of the lower gorge, on the afternoon of March 6 blew it out with dynamite, with the result that the torrent of water thus released, being caught and in part detained by the lower gorge, raised the level of the stream below to a height of ten feet, and caused it to overflow substantially all of plaintiff's lands to the depth of several feet, flooding plaintiff's residence, destroying his household effects, and depositing upon his orchard, garden, and meadows, in places, large amounts of boulders, sand, and drift timber, and in others washing away the soil to such an extent as to render these portions of them wholly useless. These facts are not controverted. There was also evidence tending to show that plaintiff's lands would not have been flooded at all but for defendant's interference with the upper gorge. There was some conflict in the statements of the witnesses upon the question whether on the morning of March 6 the flood water held by the embankment had so far subsided as to remove the threatened danger to the track, and thus the necessity for defendant to blow out the gorge as a protective measure. Under the rule of law applicable to cases of this character, as we shall see later, we think it wholly immaterial whether the necessity arose for action on the part of the defendant or not.

At the trial counsel for the defendant assumed the position that when the defendant, engaged as it is in the performance of a public duty, was confronted with the emergency created by the gorge rendering its roadbed and track unsafe, and the necessity was thus created for it to act in order to remedy the dangerous condition and safeguard its passengers and freight, it had the right to adopt any means suitable to that end, and hence that the plaintiff could not recover for any damage suffered by him by reason of the course pursued by the defendant. This position is shown by special requests for instructions tendered by the defendant, the theory of all of which is exemplified by the following: "The defendant railway company, as a common carrier of persons and freight, was in duty bound to exercise the highest degree of care to protect its line of railroad from being injured or destroyed and to take all necessary pre-

caution to prevent its line of railroad from becoming unsafe or dangerous for the movement and operation of its trains and cars over its said line of railroad. And if you find from the evidence in this case that the existence of the said upper ice gorge, and the accumulation of ice, water and material caused thereby, made it necessary for the defendant company, in order to protect its bridge, roadbed and tracks and to keep the same safe so as to enable it to operate its trains and cars with safety to passengers and freight carried over its line of road, to remove said gorge, and the said ice gorge was so removed by defendant company in order to protect its said bridge, roadbed, and tracks and keep the same safe for public travel, then the plaintiff cannot recover, and your verdict should be for the defendant.” The court refused the instructions and submitted the case to [1] the jury on the theory that, if the plaintiff would not have been damaged but for the act of the defendant in removing the gorge, he was entitled to recover. It is true that it is incumbent upon a common carrier, such as the defendant, to exercise the highest degree of care to keep its track and roadbed safe, and to this end make prompt and energetic use of every means at its command in every emergency to provide for the safety of the passengers and goods intrusted to its care, and that this duty is higher than that which it owes to land owners along the line of its road (*Louisville N. A. & C. Ry. Co. v. Thompson*, 107 Ind. 442, 57 Am. Rep. 120, 8 N. E. 18, 9 N. E. 357); but the obligation to exercise the care and diligence exacted of it in this regard does not justify the postulate that it may under any stress of circumstances appropriate to its own use or injure the property of such land owner, without rendering itself liable to him for the injury thus done. As an owner of property it has the same rights as any other person, and is under the same obligation to so use its property as not to injure that of an adjoining owner. It has the unqualified right to operate its road in a reasonable and proper manner and to adapt its property to the use for which it was acquired; but it is subject to the same rules of law as are the adjoining proprietors, and, if in conducting

its business it infringes upon the rights of others, it becomes liable for damages to the same extent as a natural person. (*Staton v. Norfolk & C. R. Co.*, 111 N. C. 278, 17 L. R. A. 838, 16 S. E. 181.) If it commits a trespass, it is liable in an action for trespass. If during the conduct of its business it creates a nuisance or suffers one to exist upon its own property, it is liable in an action on the case. In the one case no question of diligence or skill can arise; liability will attach if the injury done is the result of the active agency of the defendant. In the other it will be liable if the injury is consequential or is the result of negligence or nonfeasance. (*Fleming v. Lockwood*, 36 Mont. 384, 122 Am. St. Rep. 375, 13 Ann. Cas. 263, 14 L. R. A. (n. s.) 628, 92 Pac. 962.).

The requested instructions assume that, inasmuch as a railway is for the benefit of the public, in the authority given by the legislature to construct it, there is an implied subordination of the rights of the adjoining proprietors. This is true in so far as a railway company is given the privilege, by condemnation proceedings, to take or damage property necessary for the construction and operation of its road; but this power cannot be exercised except within the limitations and upon a fulfillment of the condition precedent attached: That no person can be deprived of his property without due process of law, and that just compensation must first be made to the owner. (Const., Art. III, secs. 14, 27.) The subordination of the rights of the private proprietors goes no further. Once the title has been acquired by the railway company, whether by purchase or condemnation, its use of it, as we have already said, must be governed by the same rules as that of private proprietors. Otherwise the guaranties of the Constitution would be of no avail. In *Staton v. Norfolk & C. R. Co.*, *supra*, it was well said: "It would be of small comfort to the ruined proprietor to be told that he must bear his loss for the benefit of the public, and it would not be unnatural if he answered that if the public good required the destruction of his property an enlightened sense of public justice should demand that he be compensated for his

loss. In this he would be sustained by the words of Sir William Blackstone that 'the public good is in nothing more essentially interested than in the protection of every individual's private rights.' (1 Bl. Com. 138.)"

Counsel insist, however, that the water forced out of the main [2] channel of the river was surface water, that the defendant had the right to treat it as a common enemy, and that any damage caused by its release by blowing out the gorge was *damnum absque injuria*. In view of the decision by this court in *Fordham v. Northern Pacific R. Co.*, 30 Mont. 421, 104 Am. St. Rep. 729, 66 L. R. A. 556, 76 Pac. 1040, it is somewhat surprising that this contention should be made. After a review of many of the decisions on the subject, and, recognizing the diversity of the views entertained by the courts as to what is and what is not flood water, the court, through Mr. Justice Holloway, said: "Without attempting to reconcile the diverse decisions, we are of the opinion that the following rule furnishes the safest guide for the determination of a question which has vexed the courts of many of our states as well as those of England, viz.: Whether the water from the overflow of streams is to be considered as still a part of the watercourse, or to be treated as surface water, shall depend upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current, or leaves the same never to return, and spreads out over the lower ground, it becomes surface water. But if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel presently to return, it is to be regarded as still a part of the stream." Further consideration of the subject has convinced us that the rule as here expressed is the only satisfactory one. Taking it as the criterion, the character of the water, and therefore the extent of the right to deal with it, must depend upon the facts as they are made to appear in the particular case. Mr. Farnham, in his work on Waters (sections 879, 880), discusses the subject and expresses, in substance, the same view. The following authorities support it:

Riddle v. Chicago, R. I. & P. R. Co., 88 Kan. 248, 128 Pac. 195; *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 107 Am. St. Rep. 968, 3 Ann. Cas. 201, 68 L. R. A. 138, 49 S. E. 378; *Clark v. Patapsco Guano Co.*, 144 N. C. 64, 119 Am. St. Rep. 931, 56 S. E. 858; *Town of Jefferson v. Hicks*, 23 Okl. 684, 24 L. R. A. (n. s.) 214, 102 Pac. 79; *Chicago etc. R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 540; Lewis on Eminent Domain, 3d ed., 566, 838; 40 Cyc. 639.

Under the facts presented in this case, the water which left [3] the main channel above the gorge and finally rested against the embankment was flood water within the rule stated in *Fordham v. Northern Pacific Ry. Co.*, *supra*; for while it was spread over the country between the embankment and the river, covering a large area, as soon as the gorge was removed and the way was opened for it, it immediately returned to the channel and became a part of the torrent which swept over and inundated the plaintiff's land, causing the injury of which he complains. While it may be conceded that it was the imperative duty of the defendant to protect the embankment from injury or destruction, the necessity for action gave it no right to turn the water resting against it upon the proprietors below, to their injury. And though it may be said that the condition was created by natural causes—was the act of God—it was not in any respect different from an ordinary flood caused by melting snow or excessive rainfall, and under the rule applied in the *Fordham Case*, the defendant must be held liable for the injury done. There is no question of negligence involved. The act of the defendant amounted to a direct violation of the plaintiff's property rights. (*Fitzpatrick v. Montgomery*, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416.)

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

CUERTH ET AL., RESPONDENTS, v. ARBOGAST, APPELLANT.

(No. 3,295.)

(Submitted October 22, 1913. Decided November 7, 1913.)

[136 Pac. 383.]

Claim and Delivery—Evidence—Admissibility—Cross-examination—Instructions—Livestock—Marks and Brands—Verdict—Insufficiency.

Claim and Delivery—Cross-examination—Scope.

1. Where plaintiff in an action in claim and delivery had testified that he had permitted fifty head of cattle (the subject of the action), valued at \$1,400, to be taken many miles away by a stranger upon a deposit of \$300, under an agreement amounting to a bailment with an option to purchase, a question asked him on cross-examination whether he had made any investigation as to the person's standing or character was improperly excluded.

[As to when and against whom replevin is maintainable, see note in 88 Am. St. Rep. 741. On the necessity and sufficiency of allegation as to the ownership or right to possession in the complaint in replevin, see note in Ann. Cas. 1912A, 333.]

Same.

2. Refusal to permit the wife of plaintiff to be cross-examined as to the details of the negotiations had between him and the person who took possession of the cattle under the circumstances referred to in paragraph 1 above, after she had testified to the transaction and that it did not amount to a sale, was error.

Same—Cross-examination—Scope—Statutes.

3. Section 8021, Revised Codes, prescribing in general terms the scope of cross-examination, must be liberally construed, and the rule extended rather than restricted.

Same—Argumentative Denial—Reply.

4. The answer of defendant in claim and delivery setting forth affirmatively the reasons why title to the cattle in controversy was in him and not in plaintiff, was an argumentative denial; hence, failure to reply did not constitute an admission of the truth of the matters stated so as to justify the exclusion of evidence offered in support thereof.

Same—Evidence—Admissibility.

5. It was error to exclude the checks given by defendant in payment of the cattle sought to be recovered in an action in claim and delivery, and which he claimed to have bought in good faith from a third person while in the latter's possession.

Same.

6. Evidence consisting of a note given by the apparent owner of the cattle and a chattel mortgage to secure the debt evidenced by it, which latter remained of record uncanceled for more than a month at the time defendant claimed to have bought the livestock, was competent for the purpose of re-enforcing the presumptions relative to the possession and ownership of property (Rev. Codes, subds. 8, 11, 12, sec. 7962).

Same—Instructions—Agreement to Purchase—To be in Writing.

7. Plaintiff's claim having been that the transaction between him and the person to whom he delivered the cattle in controversy amounted

to a bailment with an option to purchase, although the contract had not been reduced to writing, the court should, in view of section 5092, Revised Codes, which provides that unless a contract of sale of personal property where title is stipulated to remain in the vendor until final payment is in writing, and filed for record, *etc.*, the transaction is void as to a purchaser prior to filing, have defined an agreement to sell and told the jury to find for defendant if the transaction was such an agreement, and he bought the cattle while in the ostensible owner's possession.

[As to what constitutes a conditional sale, see note in 94 Am. St. Rep. 234. As to the rights of the parties to a conditional sale when the property is destroyed, see notes in Ann. Cas. 1913C, 661; Ann. Cas. 1913D, 338.]

Same—Livestock—Brands—Evidence of What.

8. *Held*, that while a recorded brand or a certificate thereof is *prima facie* evidence of its ownership, it is not *prima facie* evidence of ownership of the animal bearing it, it is a circumstance to be considered with others as tending to show, but in itself insufficient to prove, ownership.

Same—Brands—Purpose of Statute.

9. The purpose of the Mark and Brand Act (Rev. Codes, sec. 1790 *et seq.*) is to secure to the person who records his brand the exclusive use of the design adopted; and the object sought in requiring a brand to be vented is to foreclose the vendor's claim on the animal sold.

Same—Instructions—Abstract Rules of Law—Refusal not Error.

10. Refusal to submit abstract rules of law, such as the presumptions prescribed by subdivisions 8, 11 and 12 of section 7962, relative to the possession and ownership of property, to the jury in the form of instructions is not error.

Same—Verdict—When Insufficient.

11. A verdict in claim and delivery which does not respond to all the material issues tried is insufficient to sustain a judgment.

Appeal from District Court, Chouteau County; Jno. W. Tattan, Judge.

ACTION by Henry Cuerth and wife against John Arbogast. From a judgment for plaintiffs and an order denying a new trial defendant appeals. Reversed and remanded.

Messrs. Stranahan & Stranahan and *Mr. John Collins*, for Appellant, submitted a brief; *Mr. F. E. Stranahan* argued the cause orally.

There is nothing plainer from the testimony in this case than that the original intention of the parties to the transaction between the plaintiffs and Busch was one of sale and not of bailment. "The very term 'bailment' implies that the owner of an article has placed it in the hands of another, who is at some

time to redeliver it to the owner. And if the person to whom the thing is delivered has the option to restore it or to pay for it in money or other property, such option is inconsistent with the character of a bailment, and the transaction is in law a sale. *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Andrews v. Richmond*, 34 Hun (N. Y.), 20; *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623; *Austin v. Seligman*, 21 Blatchf. 506, 18 Fed. 519; *Marsh v. Titus*, 3 Hun (N. Y.), 550; and see *Kaut v. Kessler*, 114 Pa. 603, 7 Atl. 586." (Note to *Bretz v. Diehl*, 2 Am. St. Rep. 712; notes to *Slaughter v. Green*, 10 Am. Dec. 488; *First Congregational Church v. Grand Rapids S. Furniture Co.*, 15 Colo. App. 46, 60 Pac. 948; *Scott Mining etc. Co. v. Shultz*, 67 Kan. 605, 73 Pac. 903; note to *Fleet v. Hertz*, 94 Am. St. Rep. 209; *Coors v. Reagan*, 44 Colo. 126, 96 Pac. 966; 35 Cyc. 29, 655.) The burden is upon the seller to show that the sale was conditional. (35 Cyc. 653.) There is no indication whatever in the record that the plaintiffs desired or intended or had any occasion to let their cattle out to an agister, or that Busch had any desire or intention to take the cattle for the purpose of running them.

The district court erred in refusing to instruct the jury that a brand is no evidence of the ownership of the animal bearing it. This court has held that the mere transfer of the brand and a record of the transfer will not, *ipso facto*, take the place of actual possession of the animal as required by the statute concerning fraudulent sales. (*Ettien v. Drum*, 32 Mont. 311, 80 Pac. 369.) Much as we dislike to see the historic cowman's idols shattered in this way, we must of necessity ask the court to smash another, by holding that the failure to vent a brand will not take the place of the filing of a written conditional sale contract, as the law positively enjoins. The reasoning in *Stewart v. Hunter*, 16 Or. 62, 8 Am. St. Rep. 267, 16 Pac. 876, applies in this state. A person is not obliged to record his brand. Our general recorder is directed to make the record for him only who "wishes to record his brand," and the recorder "must designate the particular brand" so as to see to it that no two

persons get the same brand. A person may use any brand he chooses, recorded or unrecorded, but he must not infringe on another's recorded brand. (Rev. Codes, sec. 8864.) This question arose in a case in Kentucky, wherein the court held that the brand on an animal does not *per se* prove title, and the court there gave many illustrations to show how wholly wrong one may be in assuming that the owner of the brand is the owner of the animal that bears it. (See *Plummer v. Newdigate*, 2 Duv. (Ky.) 1, 87 Am. Dec. 479.) Concerning the venting of a brand on an animal, the supreme court of California says: "The intention clearly is to prevent the vendor from subsequently claiming the cattle, because they carry his mark and brand." (*Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135.) So that the venting of the brand is for the protection of the buyer and not for the purpose of putting a club and a shield in the hands of the seller, where he fails, as is often the case, to perform his duty under the statute, to vent the brand on the animal sold by him.

Mr. W. G. Towner, for Respondents, submitted a brief and argued the cause orally.

"A bailment with the right on the part of the bailee to buy is to be distinguished from a sale, the transaction not becoming a sale until the option is exercised." (35 Cyc. 33.) "Where by the contract a person receives a chattel which he is to keep for a certain period, and if in that time he pays for it a stipulated price, he is to become the owner, but if he does not pay for it, he is to pay for its use, such person receives it as bailee, and the right of property is not changed until the price is paid." (Mechem on Sales, sec. 32; *Enlow v. Klein*, 79 Pa. 488.) Knowledge of any fact sufficient to put a purchaser on inquiry as to the existence of some right or title conflicting with that he is about to purchase is fatal to his claim to be considered a *bona fide* purchaser. (*Reynolds v. Fitzpatrick*, 40 Mont. 593, 107 Pac. 902.)

"While possession is *prima facie* evidence of ownership of personal property, yet he who deals with such possession upon the mere evidence which possession affords takes upon himself

the risk that there is another and true owner.” (*Moore v. Robinson*, 62 Ala. 537; *Hamlin v. Sears*, 82 N. Y. 327.) “A person having no title can convey none, even to a *bona fide* purchaser.” (35 Cyc. 356.) The cattle in question were converted by Busch and sold to appellant and the latter cannot acquire title thereto. (*Howe v. Johnson*, 117 Cal. 37, 48 Pac. 978; *Smith Premier Typewriter Co. v. Stidger*, 18 Colo. App. 261, 71 Pac. 400; *New Liverpool Salt Co. v. Western Salt Co.*, 151 Cal. 479, 91 Pac. 152.) The presumption of ownership from possession from its very nature may be easily rebutted, and it affords no protection to one who purchases property or otherwise obtains it from one who is not the real owner. (Jones on Evidence, sec. 74.) “Whether a transaction is a bailment or other contract is a question for the jury” (*Brown v. Gilliam*, 53 Mo. App. 376; *Reissner v. Oxley*, 80 Ind. 580; *Porter v. Duncan*, 23 Pa. Sup. Ct. 58; *Crosby v. Delaware etc. Canal Co.*, 119 N. Y. 334, 23 N. E. 736; *James v. Plank*, 48 Ohio St. 255, 26 N. E. 1107.) “In an action by the bailor against a third person to recover property—where bailee’s power to sell is at issue—it is for the jury to determine whether bailee had the power, notwithstanding the fact of sale is undisputed.” (*Citroen v. Adam*, 53 Hun, 629, 5 N. Y. Supp. 669.)

Section 1791, Revised Codes, means that the certificate of a recorded brand is *prima facie* evidence of ownership of an animal bearing such brand. See *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433, where the court said: “The object of branding and marking cattle * * * is for the purpose of identification; that their ownership may be known and distinguished from other stock; that it may be known to whom the particular cattle belong. That stock may be identified in this manner, unless prohibited by a positive statute, is beyond dispute.” Subsequent to the decision in this case, Nevada passed a law making a recorded brand or mark *prima facie* evidence of ownership. (See, also, *Gale v. Sales*, 11 N. M. 211, 66 Pac. 520.)

Several states have adopted statutes making the recording of the brand *prima facie* evidence of ownership. (*Debord v. Johnson*, 11 Colo. App. 402, 53 Pac. 255; *Dickson v. Territory*, 6

Ariz. 199, 56 Pac. 971; *Brown v. Moss*, 53 Or. 518, 18 Ann. Cas. 451, 101 Pac. 207; *State v. Dunn*, 13 Idaho, 9, 88 Pac. 235; *Territory v. Smith*, 12 N. M. 229, 78 Pac. 42.) If our statute does not mean as contended for by respondent, then it simply relates to the mark or brand itself, and the common-law rule applicable to brands applies and would still be *prima facie* evidence of ownership of the animal. "A brand is, on common-law principles, evidence of ownership." (*Rex v. Forsythe*, 4 N. W. Ter. 398.) This case was cited in *State v. Wolfley*, 75 Kan. 406, 12 Ann. Cas. 412, 11 L. R. A. (n. s.) 87, 89 Pac. 1046, 93 Pac. 337, wherein the trial court had refused an instruction that a brand was simply to be considered by the jury for establishing identity of animals and should not be considered as proving or tending to prove ownership. The supreme court held that in the absence of a statute forbidding or regulating the use of recorded brands as evidence of ownership, they may be so used. The effect of plaintiff's recorded brand as evidence was for the jury, and the *prima facie* case made by the record might be overcome by any competent evidence or proof. (*Brown v. Moss*, 53 Or. 518, 18 Ann. Cas. 541, 101 Pac. 207.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Action in claim and delivery to recover certain cattle or their value. Defendant appealed from an adverse judgment, and from an order denying him a new trial. The plaintiffs claim that they owned the cattle in dispute, and let them to one John D. Busch under an agreement which amounted to a bailment, with an option to Busch to purchase. The defendant alleges that he purchased the cattle from Busch while he was in possession of them, and for their fair value, without notice of any outstanding claim.

1. Plaintiff Henry Cuerth testified that Busch came to him a stranger, and that, upon the security of \$300 left with him, he permitted Busch to take fifty head of cattle, valued at \$1,400, forty [1] or fifty miles away under an agreement to keep them for

three months, and to purchase them if Busch had the money to make payment. Upon cross-examination he was asked if he made any investigation as to Busch's standing or character. This was excluded as not proper cross-examination, and incompetent and immaterial. The witness had given his version of his transaction with Busch. Whether it amounted to an absolute sale, a conditional sale, an agreement to sell, or a mere bailment with an option to purchase, depended upon the truth of Cuerth's statements. It was a vital question, and any evidence, otherwise proper, which would reflect upon the probability of the story should have been received. The jury might have concluded properly that, if Cuerth did not make any inquiry into Busch's liability, it was because he then treated the transaction as a sale. In any event, the inquiry was proper, and the ruling erroneous.

2. Mrs. Cuerth, who claims to be interested in these cattle, testified on her direct examination to the negotiations between her [2, 3] husband and Busch, and that a sale to Busch was not made. On cross-examination the details of the transaction were sought; but practically every effort on the part of counsel for defendant to ascertain the facts was met by an objection that it was not cross-examination, and these objections were sustained. In fact, the rulings amounted practically to a denial of the right to cross-examine the witness. While it is the general rule that cross-examination must be confined to the material matters brought out on direct examination or connected therewith (sec. 8021, Rev. Codes; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778; *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609), and that mere excursions into matters foreign to the subject considered on direct examination will not be permitted, still the section above is to be liberally construed, and the general rule extended, rather than restricted. (*Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *Hefferlin v. Karlman*, 30 Mont. 348, 76 Pac. 757; *Knuckey v. Butte Electric R. Co.*, 45 Mont. 106, 122 Pac. 280.) The declaration of this court upon the subject was tersely made in *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884, as follows: "Section 3376, Code of Civil Procedure [8021, Rev. Codes] permits a wide range

for cross-examination, and the courts should incline to extend, rather than to restrict, the right. Properly understood, the right extends, not only to all facts stated by the witness in his original examination, but to all other facts connected with them whether directly or indirectly, which tend to enlighten the jury upon the question in controversy." In *State v. Biggs*, 45 Mont. 400, 123 Pac. 410, this was repeated, and in addition thereto we said: "The rule necessarily includes questions, the purpose of which is to bring out facts illustrative of the motives, bias and interest of the witness, or as reflecting upon his capacity and memory. The right would be of little value if inquiry into these matters were not permitted."

3. Defendant offered in evidence the checks which he had given for these cattle when he purchased them from Busch; but upon objection they were excluded, and erroneously so. In an attempted defense of the rulings, counsel for plaintiffs [4, 5] contends that, by failing to reply to the affirmative matter set forth in the answer, the purchase from and the payment to Busch were admitted; but with this we do not agree. The so-called affirmative matter amounted only to an argumentative denial of plaintiffs' title, and everything which could be proved under it could likewise be proved under a general denial. (*Kaufman v. Cooper*, 38 Mont. 6, 98 Pac. 504, 1135; *Hickey v. Breen*, 40 Mont. 368, 20 Ann. Cas. 429, 106 Pac. 881.) Defendant was entitled to show that he purchased the animals from Busch, and to offer the best evidence he had of that fact.

4. The trial court erred also in excluding defendant's offer in evidence of the note given by Busch to Fruchtbar, and a [6] chattel mortgage upon these same cattle to secure the debt evidenced by that note. The mortgage was duly filed for record in Chouteau county, the home of these plaintiffs, on June 23, within two weeks at most from the day upon which they had given the cattle into Busch's possession, and remained of record uncanceled on July 30, when the defendant alleges that he purchased the cattle from Busch, who was then in possession of them. The evidence was competent for the purpose of re-en-

forcing the presumptions which the Codes declare: "8. That a thing delivered by one to another belonged to the latter. * * *

11. That things which a person possesses are owned by him.

12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership." (Rev. Codes, sec. 7962.)

5. At the time these transactions between plaintiffs and Busch and between Busch and the defendant occurred, section 5092, Revised Codes, was in force, as follows: "All contracts, notes and instruments for the transfer or sale of personal prop-
[7] erty where the title is stipulated to remain in the vendor until the payment of the purchase price, or some part thereof, shall be in writing, and the original or a true copy thereof certified by the county clerk and recorder shall be filed with the county clerk and recorder of the county wherein the property is situate, otherwise any such contract, note or instrument is void as to a purchaser or mortgagee of such property prior to such filing." The trial court should have defined an agreement to sell and should have instructed the jury that, if they found that the transaction between plaintiffs and Busch amounted to such an agreement, and further found that defendant purchased the property from Busch while in his possession, then their verdict should be for the defendant, for it is uncontroverted in the evidence that there was not any contract reduced to writing, or any contract filed as required by section 5092 above.

6. The trial court instructed the jury "that a brand duly recorded with the recorder of marks and brands of this state is
[8] *prima facie* evidence of the ownership of an animal bearing such brand; in other words, that the owner of a duly recorded mark or brand is *prima facie* the owner of an animal bearing such brand." Counsel for respondents contends that the instruction is justified by the rules of the common law, as well as by sections 1791 and 1793, Revised Codes, and cites *Queen v. Forsythe*, 2 N. W. Ter. 398, 4 Territories L. R. 398, wherein it was held, by a divided court, that proof that an animal bore John Lawrence's mark and brand, that it was a steer three years old,

and that Lawrence had not sold or otherwise disposed of locally any steers, was sufficient proof of ownership to sustain a conviction for larceny. Nothing whatever is said by the court of any rule of the common law, and no authority whatever is cited for the holding; but much emphasis is laid upon the fact that identification of cattle by brands is a common custom in that territory. Upon a somewhat similar state of facts the like conclusion was reached by the supreme court of Oklahoma, in *Hurst v. Territory*, 16 Okl. 600, 86 Pac. 280, and in *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433; but in neither of these last two cases is there any mention made of a rule of the common law, and in neither is it asserted that a brand, or the record of a brand, is *prima facie* evidence of the ownership of the animal which bears the brand. We are satisfied that authority for the trial court's action based upon a rule of the common law cannot be found, and that such rule was never enforced except by virtue of some statute which promulgated the rule.

In *State v. Keeland*, 39 Mont. 506, 104 Pac. 513, and again in *State v. Trosper*, 41 Mont. 442, 109 Pac. 858, this court treated the brand upon an animal as evidence tending to identify the animal, and to show ownership in the one who owned the brand; while in *State v. De Wolfe*, 29 Mont. 415, 74 Pac. 1084, we said: "The fact that the O L brand belonged to Houk, and that the horses bore such brand, was not proof that they belonged to Houk at the time they were driven away, or that defendant was not rightfully in possession of them." In other words, we have said that the brand upon an animal is a circumstance to be considered with others as tending to show ownership, but in itself insufficient to prove ownership. (*Territory v. Harrington* (N. M.), 121 Pac. 613.)

It is doubtless true that in the early days, when the livestock industry was of commanding importance in this western country, common custom decreed that ownership of range animals should be determined by the brand, and that controversies over livestock should be settled by tribunals created by the owners of the herds; but, just as the *jueces del campo* gave way to legally con-

stituted tribunals, so the rules and customs of the plains were superseded by positive legislative enactments. In probably every western state mark and brand laws have been enacted, and provision made for records. In many instances the statute declares in language unmistakable in its meaning that a recorded brand or the certificate from the recorder shall be *prima facie* evidence that the person who owns the brand owns the animal which bears the brand (N. M. Comp. Laws 1897, sec. 67; Colo. Gen. Stats. 1883, sec. 3174; Idaho Rev. Stats., sec. 1179; Nev. Gen. Stats. 1885, sec. 761; Cal. Pol. Code, sec. 3172; Or. Laws 1893, p. 52; Ordinances N. W. Ter. [Can.] 1900, p. 42); but this is not true in all the western states. In Utah the statute merely provides that the recorder's certificate "shall be deemed evidence in law." (Utah Comp. Stats. 1897, sec. 39.) In 1887 the Arizona statute made the brand upon an animal *prima facie* evidence that the animal belonged to the owner of the brand (Ariz. Rev. Stats. 1887, sec. 2788); but this was repealed, so far as the rule was applicable to civil cases, in the compilation of the laws with reference to livestock, approved March 1, 1897, which declares that the certificate of the recorded brand "shall be competent evidence of the registration of such brand, and *prima facie* evidence of ownership." (Ariz. Laws 1897, p. 25, sec. 50.) In *Brill v. Christy*, 7 Ariz. 217, 63 Pac. 757, there was involved the ownership of certain cattle. A certificate of the record of the brand was offered in evidence for the purpose of showing *prima facie* title in defendant, whose brand the cattle bore. The court, after quoting section 50 of the Act of 1897 above, said: "If the ownership of the brand or the fact of its registration was in controversy, the provision quoted would be applicable. * * * Neither is the registration of the brand an issue in the case. Section 50 applies solely to the requirement for and the manner of the registration of brands, the proper evidence of such registration, and the ownership of the brands thus registered, and does not deal with the cattle that may be in such brands, the mode of their transfer, or the evidence of their ownership. * * * While, therefore, section 50 of the said

Act constitutes the certificate of the registration of a brand competent evidence of such registration, and *prima facie* evidence of the ownership of such brand, it does not make such certificate either competent or *prima facie* evidence for any other purpose.

The history of our own statute furnishes some insight into the legislative intention in passing it. By an Act approved January 10, 1872, provision was made for recording marks and brands, and for certificates to be delivered to the owners. Section 4 provided that such "certificates shall be deemed evidence in law." The same Act required that upon a sale of branded livestock the brand should be vented, and section 8 declared: "The venting of said original brand shall be *prima facie* evidence of sale or transfer of said animal or animals." These provisions were carried into the compilations of 1871-72, 1879, and 1887, without change, and were the law up to the adoption of the Codes in 1895. As the Political Code was reported, and as it first passed the House of Representatives, it contained, in lieu of the two sections above, first, a provision that a certified copy of the record of the brand shall be "*prima facie* evidence of the ownership of the brand," and, second, that "the venting or counterbranding is *prima facie* evidence of sale." In the Senate these provisions were stricken out, and in lieu thereof the language as found in the Codes to-day was substituted. These amendments were concurred in, and the Act thus amended became the law which went into effect July 1, 1895, and provided that the general recorder of marks and brands must "furnish to the owners of recorded brands a certified copy of the record of the same, which certificates are *prima facie* evidence of the ownership of the brand or mark so recorded" (Pol. Code 1895, sec. 2941), and "every person who sells * * * cattle, must vent or counterbrand such animals, * * * and the venting of said original brand shall be *prima facie* evidence of sale or transfer of said animal or animals so vented." (Pol. Code 1895, sec. 2943.) These provisions were carried into the Revised Codes of 1907, and are found in sections 1791 and 1793, respectively. It will thus be seen that, through

all the changes which have occurred in our livestock statute since 1872 the legislature, while asserting repeatedly that a vented brand is *prima facie* evidence of a sale of the animal bearing the brand, has studiously declined to say that the brand on an animal or a certificate of a recorded brand shall be *prima facie* evidence of ownership of the animal bearing the brand. On the contrary, while there may have been room for doubt as to the meaning of the original statute, which declared that the recorded certificate "shall be deemed evidence in law," the legislature which enacted the Codes declined to approve the somewhat equivocal terms employed by the Code commissioners, but cleared away all uncertainty by declaring, in language whose meaning cannot be questioned, that the certificate of a recorded brand "is *prima facie* evidence of the ownership of the mark or brand so recorded." Other state legislative bodies have had no difficulty in making a recorded brand, or a certificate of such brand, *prima facie* evidence of ownership of the animal bearing the brand, and doubtless our assemblies could have done equally as well if they had chosen to do so; but their refusal to adopt a statute similar to those in force in sister states where conditions are similar, and their final adoption of the statute in its present form, furnish most persuasive evidence that it has been the policy of this state to go no further than to recognize a brand as evidence, just as a flesh mark or other distinguishing mark or characteristic is [9] evidence. The purpose of the statute is to secure to anyone who records his brand the exclusive use of the design adopted (*Stewart v. Hunter*, 16 Or. 62, 8 Am. St. Rep. 267, 16 Pac. 876), and the object sought in requiring a brand to be vented is to foreclose the vendor's claim to the animal sold (*Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135). The instruction given is erroneous. It provides a rule of evidence not warranted by statute or the common law.

7. Counsel for appellant requested the trial court to include in an instruction the provisions of subdivisions 8, 11, and 12 of [10] section 7962 above; but the request was denied. It is not commendable practice to submit to jurors abstract rules of

law ever existed they are correct, and error cannot be predicated upon the action of the court in refusing defendant's request in the instruction. (*First Nat. Bank of Portland v. Carroll*, 20 A. 2d 1012.) If a concrete application of the rule to the facts of this case had been made, it would have been an error to refuse to submit the instruction.

Since the case must be remanded for a new trial, the attention of the court is directed to the fact that the verdict returned in this case does not respond to all the material issues tried, and is insufficient to sustain a judgment. (*See Green, above.*)

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER con-
cur.

ANACONDA COPPER MINING CO., APPELLANT, v.
THOMAS, RESPONDENT.

(No. 3,284.)

33, 1913. Decided November 7, 1913.)

[137 Pac. 380.]

—Adverse Possession—Reply—Equity—

Adverse Possession—Failure to Reply—Judgment

answer, in an action to quiet title, setting up title to lands described in the complaint herein," result of which defendant was entitled to judgment

Prayer not Conclusive.

the pleader is not concluded by his prayer, nor by reading; hence, defendant, in an action to quiet title for affirmative relief in his answer setting up title in himself, which allegation stood admitted by

failure to reply, was nevertheless entitled thereto, and, the pleading having been sufficient in form, judgment on the pleadings was proper.

Same—Adverse Possession—Admission by Failure to Reply—Effect.

3. By failure to reply to a claim of adverse possession for the statutory period, plaintiff admitted that the lands in controversy were such as to permit of possession of the character alleged by defendant, and was estopped to assert on appeal that they were unsurveyed and therefore not subject to such possession.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by the Anaconda Copper Mining Company against Charles Thomas. Judgment on the pleadings in favor of defendant; defendant appeals from an order denying a motion to vacate and set aside the judgment. Affirmed.

Mr. Elmer E. Hershey, for Appellant, submitted a brief and argued the cause orally.

Messrs. Tolan & Gaines, for Respondent, submitted a brief; *Mr. R. F. Gaines* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Suit by appellant to quiet title to the south half of the southwest quarter of section 25, township 12 north, range 16 west, Missoula county, Montana. The complaint alleges that plaintiff is the owner of the land; that defendant, without right, claims some estate or interest therein; and that such claim casts a cloud upon the title of plaintiff. The prayer is that the defendant be required to set forth the nature of his claim; that the same may be adjudged null and void; that the defendant be enjoined from asserting such claim; and that plaintiff have its costs and such other relief as may be meet and equitable. The defendant's answer, after admitting that he claims some title, right and interest in the land and denying the other allegations of the complaint, contains the following "further and separate answer and defense": "This defendant avers that ever since the 20th day of March, 1901, this defendant has been and yet is in the actual, open, peaceable, uninterrupted, exclusive, undis-

turbed, adverse and hostile possession of the lands described in the complaint herein, holding and claiming to own the same by reason of said possession of land, exclusive of any other right as against the world." The prayer of the answer is that the plaintiff take nothing, and that the defendant have his costs. No demurrer, reply, or other pleading to the answer was ever filed, and the defendant, after the time for filing reply expired, caused the default of plaintiff to be entered. Thereafter, on motion duly noticed, the court entered judgment for the defendant upon the pleadings. In this judgment it is ordered, adjudged, and decreed that the plaintiff take nothing by its action; that defendant have his costs; and that the claim of defendant to the premises "shall be and is hereby declared to be established, and * * * that the title to and the right of possession of said above-described premises shall be and the same is hereby forever quieted in and to the defendant Charles Thomas as against the claims of plaintiff," etc. After the entry of judgment the plaintiff filed a motion to vacate and set it aside, which was denied. This appeal is from the order denying that motion.

The contentions of appellant are: (1) That the so-called "further and separate answer and defense" does not contain any matter requiring a reply; (2) that it is ineffective to support the judgment as rendered; and (3) that it is ineffective to support any judgment at all.

1. As a matter of pleading, the allegations of defendant's [1] "further and separate answer and defense" were such as to require a reply, and, since none was filed, he was entitled to have judgment entered without other proof than the pleadings. (Rev. Codes, sec. 6562; *State v. Quantic*, 37 Mont. 32, 94 Pac. 491; *State ex rel. Montana C. R. Co. v. District Court*, 32 Mont. 37, 79 Pac. 546.) This conclusion is not affected by the reference to the lands in question as "the lands described in the complaint herein," instead of by legal description, since it not only could not mislead but served every substantial purpose attainable by a repetition of the description.

2. The plaintiff, asserting that the defendant claimed some right to the land which operated to cloud its title, brought him into court, demanding that he set forth the nature of his claim. He did so, and, if the statement of new matter contained in the answer and admitted by failure to reply was such as to entitle [2] him to any relief, it was the duty of the court to grant whatever relief he was entitled to upon such statement. (Rev. Codes, sec. 6562; *State v. Quantic*, *supra*.) Disregarding questions of form, the new matter alleged in the answer is confessedly sufficient to support the affirmative relief awarded; but the contention is that such relief was not warranted here because there was no formal plea for it. If the action were at law, the want of a counterclaim complete within itself would be fatal; but the action is in equity, and the pleader is not concluded by his prayer (*Gillett v. Clark*, 6 Mont. 190, 9 Pac. 823; *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. 580; *Davis v. Davis*, 9 Mont. 267, 23 Pac. 715; *Kleinschmidt v. Steele*, 15 Mont. 181, 38 Pac. 827) nor by the form of his pleading (*Davis v. Davis*, *supra*). "It is a settled rule of equity practice that when the court has before it all the parties to any difference, and when it has obtained complete jurisdiction of the whole subject matter, it will finally settle the whole controversy." (*Davis v. Davis*, *supra*.) Under this rule, the new matter set up in the answer was sufficient to support the decree. (*Davis v. Davis*, *supra*; *Walker v. Burks*, 48 Tex. 206; *Chicago etc. Land Co. v. Peck*, 112 Ill. 408; *McCormick v. District of Columbia*, 18 D. C. (7 Mackey) 534; *Sale v. Crutchfield*, 8 Bush (Ky.), 636.)

3. The contention that the answer is insufficient to sustain any judgment is based upon the assumption that judicial notice must be taken that the lands in question were unsurveyed and therefore not subject to adverse possession within the period of ten years next preceding the commencement of this action. As we view the case, determination of this question and others involved in it is unnecessary. The defendant alleged that he [3] had since March 20, 1901, been "in the actual, open, peaceable, uninterrupted, exclusive, undisturbed, adverse and

hostile possession" of the lands in question, and all this, precisely as pleaded, the plaintiff admitted by failure to reply. This admission was as complete and effective as if it had been made in set terms, and it necessarily admitted that the lands were such as to permit possession of the character alleged by the defendant, during the entire period mentioned. The plaintiff cannot now say, under the shield of judicial notice or otherwise, that such was not the fact.

The decree of the district court is not vulnerable to any of the objections urged by the appellant. Accordingly it is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied December 29, 1913.

DE SANDRO, RESPONDENT, v. MISSOULA LIGHT & WATER CO., APPELLANT.

(No. 3,305.)

(Submitted October 23, 1913. Decided November 20, 1913.)

[136 Pac. 711.]

Personal Injuries—Master and Servant—Independent Contractors—Pleading and Practice—Burden of Proof—Causal Connection—Assumption of Risk—Safe Place—Evidence—Instructions—Methods of Work—Safety—Verdicts.

Personal Injuries—Master and Servant—Independent Contractors—Evidence.

1. Evidence in an action against a city water company for injuries to a laborer by the caving of a ditch, *held* sufficient to furnish a basis for an inference that plaintiff was at the time of the accident in the employ of defendant company, and not of its codefendant, an alleged independent contractor.

[As to liability for the negligence of independent contractors, see note in 76 Am. St. Rep. 382. As to who is an independent contractor, see note in Ann. Cas. 1913B, 573.]

Same—Independent Contractors—Defense—General Denial.

2. The defense that an independent contractor was responsible for work during the course of which plaintiff sustained injuries is available under a general denial, and need not be established by a preponderance of the evidence, the burden of proving the contrary being on plaintiff.

Same—Negligence—Causal Connection—Evidence—Insufficiency.

3. Evidence *held* insufficient to meet the requirement of the rule that before defendant in a personal injury action can be declared liable, plaintiff must have proved not only the injury but also a causal connection between it and defendant's negligence.

Same—Safe Place—Exception to Rule—Assumption of Risk.

4. One who enters upon employment, such as mining or the digging of trenches, assumes the risk of the dangers incident to the making of the place which becomes dangerous as the work progresses, or the making of a dangerous place safe; the doctrine imposing upon the master the duty to furnish his servant a safe place in which to work not applying in such cases.

[As to the liability of an employer to an employee who attempts to perform extrahazardous duties, see note in 97 Am. St. Rep. 884.]

Same—Proximate Cause—Nature of Proof.

5. Though the proximate or efficient cause of a personal injury may be shown by indirect evidence, it must be of such character that it not only tends affirmatively to show that the accident was due to it, but also to exclude any other theory of its happening.

[As to the doctrine of proximate cause, see note in 36 Am. St. Rep. 807.]

Same—Independent Contractors—When Question for Jury or Court.

6. The question whether a written contract which clearly expresses all the undertakings of the parties, or an oral one presenting no controversy as to its terms, created the relation of master and servant, or that of employer and independent contractor, is one for the court; otherwise it is one to be determined by the jury under proper instructions.

Same—Assumption of Risk—Jury Question.

7. Whether plaintiff, a laborer engaged in digging a trench, assumed the risk incident to his employment, *held* to have been properly submitted, upon the theory of negligence based on the failure of defendant to make safe the completed portion of the trench.

Same—Evidence—Technical Error—Effect.

8. For merely technical error in the admission and exclusion of evidence which did not result in prejudice to appellant, a judgment will not be reversed.

Same—Independent Contractors—Payment of Wages—Evidence—Cross-examination—Proper Exclusion.

9. Plaintiff having testified that his wages had been paid through check by one H., alleged by defendant corporation to have been an independent contractor, an objection to the question asked him on cross-examination whether he knew for whom he was working was properly sustained as immaterial, the issue being who was in fact his employer and not his knowledge as to the relation existing between H. and the company.

Same—Independent Contractors—Evidence—Admissibility.

10. Plaintiff's evidence that he saw defendant company's foreman on the ditch line the day before the accident, and that the latter had ordered the person in charge to keep the crew at work at a certain point,

was admissible as tending to show how far the company retained control of the work, it being its contention that it was being done by its codefendant, an independent contractor.

Same—Method of Work—Safety—Assumption of Facts—When Proper.

11. While the court in its instructions might have assumed that "shearing" the lips of a trench was a reasonable and proper method of making it safe, in view of the fact that the evidence in this regard was uncontradicted and accorded with common observation and experience, its refusal to do so did not result in prejudice to defendant.

Same—Cities and Towns—Public Service Corporations—Validity of Contracts.

12. *Quære*: May a water company operating under a franchise from a city, let a contract for the digging and refilling of trenches so as to relieve itself from liability to the contractor's employees for damages on account of injuries sustained because of his negligence in doing the work?

Same—Codefendants—Arbitrary Verdict as to One—Validity.

13. Where, in a personal injury action brought jointly against the employer and his agent or servant, the jury arbitrarily acquits the latter though the wrong complained of was done through his negligence, the verdict against the principal will nevertheless be allowed to stand.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by Angelo De Sandro against the Missoula Light Water Company and another. From a judgment for plaintiff and from an order denying a new trial, the defendant company appeals. Reversed and remanded.

Messrs. W. M. Bickford, W. L. Murphy, and Harry H. Parsons, for Appellant, submitted a brief; Mr. Murphy argued the case orally.

The only evidence that in any way tends to show control in anyone other than Hadalin and his foreman was one statement alleged to have been made by Manager Wright to Odenwald, the foreman of Hadalin: "Keep these men here to-morrow; I want this work done." We submit that this might have been a request, an unwarranted direction, or if warranted, went only as a notification to Hadalin, who, the evidence shows, was engaged in performing similar work under contract with other persons on his own account, that appellant wanted this particular job prosecuted to completion, without interruption or delay. This does not interfere with the independency of the contract; even

the right to put on a sufficient force to complete the work left in the discretion of the owner does not defeat the relationship. The broad question to be determined here is: Had appellant the right to compel Hadalin to protect his workmen by bracing this ditch? The evidence shows that bracing, under the circumstances, where water-pipe had to be laid in the trench, and that the trench was only five and one half feet in depth, was impracticable. But eliminating that question, it is undisputably shown by the contract of 1909, the contract of 1910, reduced to writing in September after the accident, and by the undisputed testimony of Brown, Hadalin, Wright and Odenwald, that no such right to control in that particular existed in the company. (*Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Charlock v. Freel*, 125 N. Y. 357, 26 N. E. 262; *Rait v. New England Furniture etc. Co.*, 66 Minn. 76, 68 N. W. 729; *Roe v. Winston*, 86 Minn. 77, 90 N. W. 122.)

The relationship of principal and contractor existing between the company and Hadalin was established by the testimony. The only remaining question on this phase of the case is as to whether or not some peculiar condition nullifies the fact of the relationship. If the nature of the work done by Hadalin under the contract was such that the company must at all events see that the work was done in a certain way, and free from negligence, then, so far as the public, or indeed any stranger is concerned, the independent contract avails the company not at all in an action based on negligence. So, if the work delegated to Hadalin constituted some franchise obligation, privilege or requirement, then the public is not bound to recognize the independent contract. This rule has never been extended by the courts to include the independent contractor himself, or his servants, who, by virtue of their employment, stand in the shoes of their employer, the independent contractor. (See *Bibb's Admr. v. Norfolk W. R. Co.*, 87 Va. 711, 14 S. E. 163.) The one case that seems to hold a different view is *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66, but the statement of the rule there laid down will be found to be but a

loose statement and *obiter dictum*. The court said: "Even though the person who causes the injury is a contractor, he will be regarded as a servant or agent of the corporation for whom he is doing work, if he is exercising some charter privilege or power of such corporation with its assent, which he could not have exercised independent of the charter of such corporation." In support of this proposition three Illinois cases are cited, two of which do not at all support the principle laid down or extend it to the servant of the contractor; and the third is freely criticised in a later Illinois case decided by a court of last resort, as stating a principle of law so loosely as to render it incorrect. *West v. St. Louis etc. R. Co.*, 63 Ill. 545, and *Balsley v. St. Louis etc. R. Co.*, 119 Ill. 68, 59 Am. Rep. 784, 8 N. E. 859, are founded upon the duty of the railway company toward the public in the exercise of its franchise rights. The third case is that of *Toledo etc. R. Co. v. Conroy*, 39 Ill. App. 351. The supreme court of Illinois in *Boyd v. Chicago & N. W. R. Co.*, 217 Ill. 332, 108 Am. St. Rep. 253, 75 N. E. 496, said: "Neither of these cases is applicable here, and the general doctrine is not accurately stated in *Toledo etc. R. Co. v. Conroy*, 39 Ill. App. 351." That the duty to the general public is widely different from that to a servant of the person doing the work, see *Deming v. Terminal Railway of Buffalo*, 169 N. Y. 1, 88 Am. St. Rep. 521, 61 N. E. 983; *Branstrator v. Keokuk & W. Ry. Co.*, 108 Iowa, 377, 79 N. W. 130.

It was the duty of Hadalin to so construct the ditch as to allow the pipemen to enter the trench for the purpose of laying and fitting water-pipe. That being Hadalin's duty in the premises and his servant—De Sandro—having been employed to carry out that purpose, and further having nearly twenty years' experience in that line of work and being fully advised of the purpose of the work, he was required under his employment to use what skill he had to accomplish that purpose; and if the nature of the soil required that the sides of the ditch should be "sheared" away near the surface to prevent caving while the pipe was being laid, then it was his duty, he having the required

skill and experience, to use it for the purpose of protecting the ditch until the pipes should have been laid. (*Schmit v. Gillen*, 41 App. Div. 302, 58 N. Y. Supp. 458; *Kranz v. Long Island Ry. Co.*, 123 N. Y. 1, 20 Am. St. Rep. 716, 25 N. E. 206.)

The jury found against the appellant and expressly found in favor of the codefendant, Hadalin. Having found in favor of defendant Hadalin—since the company acted through him, if it acted at all, in the particular wherein negligence is charged—a verdict in favor of Hadalin required a verdict for the appellant, and hence the court erred in refusing to enter a judgment in its favor. The verdict is self-contradictory and will not support a judgment for the plaintiff. (*Morris v. Northwestern Improvement Co.*, 53 Wash. 451, 102 Pac. 402; *McGinnis v. Chicago R. I. & P. R. Co.*, 200 Mo. 347, 118 Am. St. Rep. 661, 9 Ann. Cas. 656, 9 L. R. A. (n. s.) 880, 98 S. W. 590; *Hayes v. Chicago Tel. Co.*, 218 Ill. 414, 2 L. R. A. (n. s.) 764, 75 N. E. 1003; *Forsell v. Pittsburg & M. Copper Co.*, 38 Mont. 403, 100 Pac. 218.)

Messrs. John H. Tolan and R. F. Gaines, for Respondent, submitted a brief; *Mr. Gaines* argued the cause orally.

It is admitted in this action that the water company was engaged in furnishing water to consumers within the city of Missoula pursuant to franchise authority from the city. This being so, we contend that had the relation of contractor and contractee otherwise been proven to exist, the character of the work and the fact that it was being done pursuant to franchise authority precluded the existence of that relation, because in such instances the right of control of the person doing the work is of necessity and by law not only reserved but imposed upon the grantee of the franchise. Among other privileges given by the franchise in question was that of making excavations in the public streets of the city of Missoula. Without such franchise any person or corporation making excavations in the streets of a city unquestionably would be operating without right and would be committing a nuisance. (*Luce v. Holloway*, 156 Cal. 162, 103 Pac. 886.) Within the city of Missoula, then, in opening up the

street—digging ditches therein—Hadalín was of necessity doing an act which could only lawfully be done by reason of the existence of the franchise. In other words, we contend that he was exercising a franchise right of the water company. (See Moll on Independent Contractors and Employer's Liability, secs. 115-127, 148; Thompson on Negligence, secs. 665, 669, 670, 672; *O'Hara v. La Clede Gas Light Co.*, 131 Mo. App. 428, 110 S. W. 642; *North Chicago St. R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796; *Solomon R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657.) These cases do not deal with injuries to employees of the person sought to be denominated an independent contractor. But upon principle where can the distinction be? As to the public at large the franchise-holder is liable, because he is in the eyes of the law the person doing the work and is bound to see to its proper performance. It is because he sustains that relation to the work that the public may look to him for compensation; and if he sustains that relation to the work, the employee, who is a third party as much as a traveler upon the streets so far as the contract is concerned, may also look to the franchise-holder for compensation for injuries. This has been squarely announced and applied in the following cases: *Toledo etc. R. Co. v. Conroy*, 39 Ill. App. 351; *Philadelphia etc. R. Co. v. Hahn* (Pa.), 12 Atl. 480; *Chicago etc. Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66.

The ownership of a franchise and work done under it *prima facie* makes the owner of the franchise responsible for the conduct of the work. (*Solomon R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657; *Flaherty v. Butte Electric R. Co.*, 43 Mont. 141, 115 Pac. 40; *Ringue v. Oregon Coal Co.*, 44 Or. 407, 75 Pac. 703; *Rummell v. Dilworth*, 111 Pa. 343, 2 Atl. 355; *Corbin v. American Mills*, 27 Conn. 274, 71 Am. Dec. 63; Thompson on Negligence, sec. 579; 26 Cyc. 971; 8 Ency. of Evidence, 496, 497.)

On the questions of negligence and assumption of risk, we call attention to the following ditch-digging cases: *Soyer v. Great Falls Water Co.*, 15 Mont. 1, 37 Pac. 838; *City of Fort Wayne v. Christie*, 156 Ind. 172, 59 N. E. 385; *Bartolomeo v. McKnight*, 178 Mass. 242, 59 N. E. 804. The case of *Hennessy v. City of*

Boston, 161 Mass. 502, 37 N. E. 668, is also a ditch-digging case. It was there said that it was not part of a plaintiff's duty to make an inspection to determine the stability of the soil otherwise than was necessary in the course of the very work he was doing; that aside from that work he could intrust the inspection of the remainder to the employer. This last-named case and also the case of *Coan v. Marlborough*, 164 Mass. 206, 41 N. E. 238, are each authority for the statement that the mere fact that a laborer has experience in this line of work does not make the question of assumption of risk one for the court; but that such fact is for the consideration of the jury together with other evidence. (See, also, Labatt on Master and Servant, sec. 98.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff recovered a judgment for damages for personal injuries alleged to have been suffered by him during the course of his employment as a servant, by the defendant Missoula Light & Water Company. Adam Hadalin was also made a defendant, but the jury found in his favor. Plaintiff has not appealed, nor did he reserve and incorporate in the record exceptions to any rulings adverse to him during the course of the trial. The Missoula Light & Water Company has appealed from the judgment and an order denying its motion for a new trial. This defendant, hereinafter referred to as "the company," is the owner of a franchise granted by the city of Missoula, whereby it is authorized to lay the mains and pipe-lines in the streets of the city necessary to enable it to distribute water to the inhabitants. The franchise in express terms grants the privilege of making such excavations in the streets and alleys as are required to install the system of mains and pipe-lines and to keep it in repair. It provides that the company shall repair or pay for any damage done by it to property or persons by reason of the construction or maintenance of the system. Under an arrangement between the company and the defendant Hadalin, the latter had undertaken

to do, at a stipulated price per foot, all the digging and refilling of trenches required by the company for the laying of pipe-lines, for the year 1910. Under this arrangement Hadalin employed his own men, including a foreman, and furnished all the tools and implements necessary to do the work, and agreed to hold the company harmless as against any claim for damages by reason of the doing of the work or any part of it. At the time of the accident the plaintiff, with others, in all about fifteen men, was engaged, under the direction of one Odenwald, Hadalin's ostensible foreman, in excavating a trench on South Seventh street, in what is designated in the record as No. 2 Daly Addition to the city of Missoula. The addition had not, at the time, been incorporated in the city, because the owner of it had not complied with the requirements of the statute relating to additions to cities and towns. (Rev. Codes, secs. 3212, 3213, 3465 *et seq.*) The pipe-line theretofore laid on this street was, by the work in hand, being extended from the city limits into the addition at the expense of the owner. The place where the accident occurred was therefore not within the city limits, though the street mentioned is an extension of the street of the city having the same designation. The manner of doing the work was as follows: Each employee was allotted a section of twelve and a half or thirteen feet, which he was expected to complete during the forenoon. A like amount was allotted to him for the afternoon. In case any one of them had not fully completed his allotment within the time allowed, the others would assist him. The trench was five and a half feet deep and two feet in width. The debris was shoveled out upon the surface of the sides of the trench. At noon on the day of the accident the plaintiff had finished the task allotted to him up to that time. As soon as he had taken his lunch he went to the assistance of another who had not completed his task. At that point the ditch had been completed to the depth of about four feet. While the plaintiff was engaged in lowering it to the required depth, the walls for a distance of from fifteen to thirty feet caved in and partially covered him, breaking his left leg below the knee. From causes which super-

vened thereafter it became necessary for the limb to be amputated above the knee.

It is alleged that the defendants were engaged in excavating ditches in certain streets of the city of Missoula; that they well knew, or in the exercise of ordinary care ought to have known, that the nature of the soil in which the excavation was being made required the walls of the completed portions thereof to be supported by some sort of cribbing or other appropriate means in order to prevent them from crumbling or caving; that the lack of such cribbing or support rendered it unsafe to work in the incomplete portions; that with knowledge of these conditions the defendants wholly failed and neglected to provide any cribbing or support for the walls of the completed portions; that plaintiff did not know of the conditions; and that while he was engaged in his work, the walls of the completed portion crumbled and caved in, causing the walls of the incomplete portion, where the plaintiff was at work, also to crumble and fall upon him, whereby he suffered the injuries complained of.

The defendants filed separate answers; the company, admitting its corporate capacity and plaintiff's injury, denied all the other material allegations of the complaint. Among other matters designated as affirmative defenses, it alleged that at the time the plaintiff was injured he was not in the employment of the company, but was in the employ of its codefendant Hadalin, under an independent contract, by the terms of which the latter had exclusive control of the construction of the trenches required by the company, at a stipulated price per foot for excavation and refilling, and that neither the company nor any of its officers or agents had any right to control, or was responsible for, any act or omission of said Hadalin. The defendants also relied upon the special defenses of contributory negligence and assumption of risk. There was issue by reply.

The brief of counsel for the company contains thirty-five assignments of error, to most of which they have devoted attention in their argument. Many of them are wholly without merit. We shall give special notice to such of them only as will serve

to guide the court on another trial, which must be ordered on the ground of insufficiency of the evidence to sustain the verdict.

1. The sufficiency of the evidence to make a case for the jury was challenged during the trial, both by motion for nonsuit and by request for a directed verdict. The principal contention [1] now made is that the evidence introduced by the plaintiff fails to show *prima facie* that, at the time of his injury, he was in the employment of the company, and that, if it be conceded that he was employed by the company and that the latter was guilty of negligence in failing to support the walls of the completed portions of the trench by any suitable means, the evidence wholly fails to show a causal connection between this dereliction of duty and the plaintiff's injury.

The plaintiff was the only witness who testified in his behalf as to the character of the work, the purpose for which it was being done, the surrounding circumstances, and how and by whom he was paid his wages. When his case was closed no contract had been shown between Hadalin and the company. On the other hand, it appeared that the trench was being excavated for the company for the laying of a pipe-line which was to be part of its system, and that it was engaged, with another crew of men, in laying pipe therein as fast as it was completed. It was shown that the plaintiff's wages were being paid by Hadalin, but Hadalin's relations to the company were not shown, except that he was directing the work as it progressed. One seeing how and for what purposes the operations were being conducted, and knowing, as he must, that corporations can act only through agents, would naturally infer that the whole enterprise was that of the defendant company. These circumstances, we think, furnish a sufficient basis for an inference, in the absence of countervailing evidence or circumstances in themselves explanatory of the situation, that all the men engaged were the employees of the company. It was said by Chief Justice Cockburn, in *Welfare v. London & Brighton Ry. Co.*, L. R. 4 Q. B. 693: "I agree that where a thing is being done upon the premises of an individual or a company in the ordinary course of business,

it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done." To the same effect are the remarks of Justice Clopton, in *Rome & Decatur R. R. Co. v. Chasteen*, 88 Ala. 591, 7 South. 94: "As no contract was produced or proved, which was in the power of the defendant, evidence that the engine and cars belonged to the company, and that the road was being constructed for its benefit, if believed, *prima facie* shows that those employed in the work of construction were the agents and servants of the company, and devolves on it the burden to prove that the road, engine, and cars were in the possession and under the control of Callahan as a contractor, and that those employed were exclusively his agents and servants. As an inference may be reasonably drawn that the company retained the right to direct what should be done, and how—the general mode of performance—though Callahan may have employed and paid the workmen, the sufficiency of the undisputed facts mentioned to overcome the presumption arising from ownership was a question for the jury, on consideration of all the circumstances proved." The decisions recognizing the doctrine stated above are not numerous, but the following are more or less directly in point: *McCamus v. Citizens' Gaslight Co.*, 40 Barb. (N. Y.) 380; *Redstrake v. Swayze*, 52 N. J. L. 129, 18 Atl. 697; *Dillon v. Hunt*, 82 Mo. 150; *Perry v. Ford*, 17 Mo. App. 212. See, also, Moll on Independent Contractors, *etc.*, sec. 32, and note to *Richmond v. Sitterding*, 65 L. R. A. 445, at page 459.

Of course, it was indispensable for the plaintiff to show his employment in the first instance. Without a *prima facie* showing of the relation established by it, he could not recover. Having the affirmative of the issue, the burden was upon him to produce evidence to support it, and as to this issue the burden was upon him throughout. (Rev. Codes, sec. 7972.) But under the doctrine of the cases cited *supra*, the circumstances disclosed by plaintiff's own testimony were sufficient to call for the production of evidence to rebut the presumption thus raised against the company. In a given case the circumstances developed by

plaintiff's witnesses may be such as to furnish no basis for an inference in his favor. As was pointed out by Chief Justice Cockburn, in *Welfare v. London & Brighton Ry. Co.*, *supra*, the character of the work done may be such as to rebut any presumption that the person doing it is in the employ of the defendant or is its agent. Under this condition of the evidence the plaintiff has not made a *prima facie* case calling for the opinion of the jury, but must produce other evidence to avoid a nonsuit. The defendant is responsible upon the principle of the maxim "*Qui facit per alium facit per se*"; and if at the end of plaintiff's case there has not been made out a *prima facie* case of employment by the defendant, or at the end of the whole case it has not been disclosed by a preponderance of the evidence that the defendant is the master—the responsible principal—the plaintiff cannot recover.

The defense that the person responsible for the work is an independent contractor is not affirmative in its nature. At common law it was available under a plea of not guilty. (*Greenwalt v. Horner*, 6 Serg. & R. (Pa.) 71; *Hall v. Snowhill*, 14 N. J. L. 551; *Plowman v. Foster*, 6 Cold. (Tenn.) 52; *Bidd's Admr. v. Norfolk & W. R. Co.*, 87 Va. 711, 14 S. E. 163.) Under the Code it is equally available under a general denial, because evidence tending to show that a person other than the defendant is the responsible principal—the master—not only tends to negative the fact of employment by the defendant, but also that the negligence causing the injury was his. So far as we know, no court has announced the rule that the defense must be established by a preponderance of the evidence. If the plaintiff's case as made at the close of his evidence calls for the opinion of the jury, the defendant must thereupon proceed with his evidence in rebuttal, but he is never required to assume any greater burden; and if at the close of the whole case it appears that the work was being done by an independent contractor, or the evidence on this point stands at an equipoise, he is entitled to a verdict. Just here it may be remarked that the trial court adopted the view that the burden was upon the company to estab-

lish this defense by a preponderance of the evidence. This was clearly error.

While we think the evidence sufficient to show *prima facie* an employment by the company and a dereliction of duty in the failure to provide against the caving of the walls of the completed portion of the trench, we also think it wholly fails to show, directly or inferentially, any causal connection between this dereliction and the injury suffered by the plaintiff. Under the allegations of the complaint, the failure to crib or support the walls of the completed portion caused the walls of the incomplete portion to crumble and cave. It is the duty of the master to exercise ordinary diligence to furnish his servant with a reasonably safe place in which to work. He cannot delegate this duty to another so as to avoid being held responsible for any negligence in that behalf. This rule, however, does not apply when the servant is employed in making a dangerous place safe, or when the making of the place is an incident of the work in which he is engaged and the danger arises from the work as it progresses. This is true particularly of mining and other industries which from their nature require service in dangerous places, as well as in the making of them. The master, if a corporation, must necessarily employ someone to do this work. The necessities of the case, therefore, require the servant, when he enters upon such an employment, to assume the risk of such dangers as are incident to it. (*Thurman v. Pittsburg & Mont. Copper Co.*, 41 Mont. 141, 108 Pac. 588; Labatt on Master and Servant, 2d ed., sec. 1177.)

The plaintiff is a foreigner. He speaks broken English, and some of his statements are somewhat quaint. The following excerpts from his evidence will be sufficient to show that it wholly fails to support the allegations in the complaint: "I came back this end and helped this man here; and my bank started to cave in and reached me and buried me up. While I was working in this ditch in the afternoon, I was turned east and the cave-in came from the west. I was digging and shoveling both in the afternoon; digging I believe and shoveling is the same thing. I

was working on the west side when I was through there, and went to help another man when I was hurt. The dirt came on me just about here. After the dirt buried me I did not lose consciousness. I started to yell; another man came and dug me out. I said something a while ago about the ditch caving starting at the west. I saw that afterward; after they dug me up. The time they took me up they left me there; then I turned back and saw it was caven on the west side of me; it was about from thirty to thirty-five feet west. * * * The first man west of me was about thirty or thirty-five feet. When the dirt covered me up it did not cover my head and the upper part of my body; I looked back west at the same time the cave struck me. They dug me up, and I could not myself, and I turned back, and they helped me, took me out while I was looking back, too. I turned round and looked back and saw the ditch just as the cave struck me and saw the cave-in. It was caving in, sliding, falling. Back of me at the time I turned around I saw the ditch falling in. At that time the ditch was falling in about thirty or thirty-five feet. I did not see, could not see, it fall; it was fallen already. I did not see it fall; I just saw what buried me. I did not see the cave fall at all. I felt that it was falling. I do not know where that cave started back of me. It started with a piece of work I was through in the morning. I know that because I saw it after; saw it after it was caved in. Q. It was all fallen down when you saw it? A. That end of it faced me; I didn't was looking around. As to whether or not it caved both ways, I did not see it. I saw when it reached me; it buried me up. All I know is when I looked at it the ground was caved in there for thirty or thirty-five feet. I know it started back of me. I was not looking back at the time it was caving. I do not know where it started." This evidence was not aided by the testimony of any other witness.

The witness Hadalin said: "When I went there in the afternoon about twelve or fifteen feet in length of the bank had fallen into the ditch on the north side of the ditch. * * * When I got back there in the afternoon I found that twelve or thirteen

feet had caved in. Mr. Odenwald and I measured it; I do not exactly remember the number of feet, but it was only a short distance, twelve or fifteen feet to the best of my knowledge." Odenwald testified: "The cave-in of the ditch on the north bank was about twelve or fifteen feet, and on the south bank not quite that much, I don't think."

Marino Scandello, a fellow-workman of plaintiff, testified: "I noticed how far along the ditch the cave-in extended; it was about fifteen feet. De Sandro was in the center of this cave, and the ground was caved on both sides of where De Sandro was. I was there before De Sandro was liberated and taken out of the ditch."

The utmost that this evidence tends to show is that the plaintiff was caught and injured by the caving of the walls at the place in which he was working. Whether he himself caused the fall of the material by a stroke of his pick at that place, or whether because of the nature of the ground, disturbed as it was by his work, it began to cave there and extended to the completed portion, or whether it began in the completed portion, and the fall there carried with it the walls at the point where the plaintiff was at work, are questions left entirely to speculation. If the nature of the soil at that place was such that the plaintiff's operations were likely to cause it to fall, this was a catastrophe which he was bound to foresee and guard against; for it is conceded that cribbing could not have been put in at that place until that portion of the trench had been completed. It is not sufficient that the plaintiff prove the injury. It is necessary that he go further and show by some substantial evidence the causal connection between the negligence of the defendant and the injury; for the master cannot be held liable if his negligence was merely a condition, as opposed to the efficient cause of the injury. (Labatt on Master and Servant, 2d ed., sec. 1570; *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.) The efficient cause may be shown by indirect evidence, but it cannot be said to be established by such evidence unless the circumstances are such that they not only tend

affirmatively to show it, but also tend to exclude any other. (*Monson v. La France Copper Co.*, *supra*; *McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40; *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515.)

The further contention is made that the evidence as a whole demonstrates that the plaintiff was employed by Hadalin as an independent contractor, and hence that the court should have directed a verdict for the company. During the years 1909 and 1910 the company was apparently engaged in reconstructing and extending its system. It had entered into a written contract for the year 1909 with Hadalin & Campbell, as copartners, under the terms of which the latter agreed to dig and refill all trenches required for the work during the year, at a stipulated price per foot. The contract had been executed to the satisfaction of the company. For the year 1910 it contracted exclusively with Hadalin. This contract the evidence tended to show was to be reduced to writing, but that this was not done because Mr. Brown, the manager of the company, was too busy to attend to it. In September, after the accident had happened, this was done. Except the price per foot stipulated for, the writing expressed substantially the stipulations and conditions contained in the one entered into the year before, though there was some discrepancy in the statements of Brown and Hadalin on the subject. Both testified, however, that it contained the terms and stipulations which had been agreed upon by them at the time. The writing was dated back to April 1, the time at which Hadalin actually began work. Under its terms Hadalin agreed to do all the excavation and refilling of trenches required by the company during the year 1910, to supply his own tools and other means of doing the work, to complete the work from time to time, and at points indicated by the company, in a workmanlike manner, subject to the approval of the foreman of the company, and to save the company harmless against any claim for damages caused by him. The company on its part was to pay Hadalin from time to time on estimates of the amount of work done. This evidence tends further to show that from April until the

contract was reduced to writing, periodical settlements were made between Hadalin and the company, based upon estimates at the price per foot named in the contract, the company paying a lump sum for the amount due, and that Hadalin employed and paid all the men who did the excavation work.

It is insisted by counsel that this evidence stands uncontroverted by any evidence in the record, and hence that the court erred in submitting to the jury the question whether Hadalin was [6] an independent contractor. With this contention we do not agree. But for the fact that the parties prepared and signed the writing in September, the question whether there was or was not a contract would have been left entirely to rest upon parol evidence. The preparation of the writing at that time did not change the situation so far as it covered the time prior to the accident. In the absence of the writing it would have been the exclusive province of the jury to say whether there was or was not a contract; for whether there was or not depended upon the truth of the statements of Brown and Hadalin in that behalf, in the light of the surrounding circumstances. There was some evidence that Wright, the general foreman of the company, was present and gave some orders to Odenwald touching the completion of the particular work on which Hadalin was engaged on the day before the accident. This was a circumstance to be considered by the jury in connection with the other evidence as to how far the company retained control of the work. The mode pursued for periodical settlements between Hadalin and the company tended to corroborate Hadalin and Brown as to the terms of the contract, but this did not so conclusively establish the fact of its existence that the court was warranted in taking the case from the jury. The production of the writing did not aid the defendant's case; on the contrary, the fact that it was executed after the accident, and dated back to cover the time of its occurrence, might be suggestive of fabrication in order to save the company from liability. This was also a circumstance to be considered by the jury; for the question of good or bad faith of the transaction thus was made a matter of inquiry to be determined

by the jury. When such a contract is in writing and clearly expresses all the undertakings of the parties, the relation it creates between them is to be determined exclusively by the court. (*Good v. Johnson*, 38 Colo. 440, 8 L. R. A. (n. s.) 896, 88 Pac. 439; *Moll on Independent Contractors, etc.*, sec. 32; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Mayhew v. Sullivan Min. Co.*, 76 Me. 100.) So, too, when, though verbal, there is no controversy or uncertainty in the evidence as to the terms of the contract and there is room for only one inference, it is to be construed by the court. (*Drennen v. Smith*, 115 Ala. 396, 22 South. 442; *Moll on Independent Contractors, etc.*, sec. 29.) When, however, as in this case, the contract is not in writing, and the evidence is not entirely clear as to its terms, and different deductions may be drawn from it, especially so when a question of good faith is at issue, the relations of the parties are to be determined by the jury under proper instructions. (*Rome & D. R. Co v. Chasteen*, 88 Ala. 591, 7 South. 94; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Daley v. Boston etc. R. R. Co.*, 147 Mass. 101, 16 N. E. 690. See, also, note to *Richmond v. Sitterding*, cited *supra*, 65 L. R. A. 508.)

The contention is also made that the court should have directed a verdict on the ground that the danger incident to the employment was shown by the evidence to have been obvious and fully [7] understood by the plaintiff. On the theory that the injury was caused by a cave-in in the completed portion of the trench, which would not have occurred if precaution had been taken to make safe the completed portion, we think the question whether plaintiff assumed the risk of danger from this source was properly submitted to the jury.

2. We have examined the several assignments upon the rulings of the court in admitting and excluding evidence. Some of them [8] were objectionable from a technical point of view, yet we do not think the company suffered prejudice by reason of any of them. Others of which complaint is made were correct. To illustrate: The ordinance granting the franchise which the company acquired by assignment from the original grantee was ad-

mitted in evidence without preliminary proof that it is one of the ordinances of the city. That the franchise was granted by this ordinance is admitted in the answer. While it was not relevant to any issue involved, its admission could not have wrought any prejudice.

It appeared from the testimony of plaintiff that he had been [9] paid his wages by Hadalin by check, and that he had signed the pay-roll kept by Hadalin. On cross-examination he was asked whether after he received the checks signed by Hadalin, he knew for whom he was working. An objection to the question was sustained on the ground that it was not proper cross-examination, and that it called for the conclusion of the witness. We think it was wholly immaterial whether the plaintiff knew for whom he was working, the real inquiry being who in fact was his employer. Though he knew that Hadalin paid him, he could not be expected to know the relations of Hadalin to the company. Again, this witness was permitted, over objection, to state [10] that he saw Mr. Wright, the foreman of the company, on the line of trench the day prior to that on which the accident occurred, and that the latter had ordered Odenwald, the foreman in charge, to keep the crew at work at that place the following day. The evidence was competent as reflecting upon the relations of the parties, and as tending to show how far the company retained control of the work being superintended by Odenwald.

3. The instructions submitted to the jury are criticised in many particulars, the chief complaint being made of those wherein the court declared that the company must, in order to avoid liability, show by a preponderance of the evidence that the plaintiff was employed by Hadalin as an independent contractor. Though the contract was pleaded as a special defense, counsel by specific objection and exceptions to the instructions on the subject sufficiently reserved the question as to who should sustain the burden of proof. What has already been said in discussing the evidence is sufficient to dispose of these assignments. It is sufficient also to dispose of the assignments upon the question whether the court should have instructed the jury to find for the defendants.

There was evidence tending to show that the nature of the soil in which the excavation was being made was such that cribbing or other suitable support was necessary to prevent the walls of the completed portions from caving. There was also evidence tending to show that caving could have been prevented as well by "shearing" off the lips of the trench or digging it wider at the top, thus removing a portion of the superincumbent weight, and that a short time prior to the accident special instructions had been given by Hadalin to all the men working on the trench to do this. These instructions, the witness stated, were given because on a preceding day a cave-in had occurred, slightly injuring one of the men. The plaintiff denied that he had been so instructed. [11] Counsel requested the court to instruct the jury that shearing was a reasonable and proper method to protect the workmen, and that if they found that special instructions had been given to the plaintiff to pursue this method, but that he had failed to do so, and that the accident was the result, they should find for the defendants. The court modified this instruction so as to submit also the question whether or not the method was reasonable and proper. Contention is made that the court erred in modifying the request. The evidence tending to show that the method called "shearing" was proper and safe was not contradicted or impeached in any way; indeed, that it would have furnished ample protection to anyone working in the trench is manifest. Of course, it was a question for the jury whether Hadalin had given instructions to the men, as he and other witnesses stated. Since the evidence as to the propriety and safety of the method was not contradicted, but was entirely in accord with the experience and common observation of men, the court might well have assumed it true and given the instructions as framed by counsel. We do not think, however, that prejudice was wrought by the modification.

The question whether the company, operating as it does under [12] a franchise from the city, could let a contract to Hadalin for the digging and refilling of the trenches, so as to relieve itself from liability to Hadalin's employees for damages

for injuries caused by his negligence, was raised during the course of the trial. The court held that such a contract is valid, as is manifest from the fact that it permitted the jury to find whether there was a contract or not. Counsel for plaintiff, so far as the record shows, did not make objection to any instruction and reserve exception, under the provisions of the Code (Rev. Codes, sec. 7118), to the action of the court in that behalf, so as to require this court to review it. In their briefs counsel have devoted a great deal of space to a discussion of the validity of such a contract, and also to the question whether it was invalid so far as any of the work to be done under it was without the city limits. Since the court held in favor of the company as to the validity of the contract, it has no right to complain.

Plaintiff cannot complain because counsel did not reserve the question, as required by the statute. Under these circumstances we must accept the opinion of the trial court as to the law of the case for the purpose of these appeals, and decline to undertake a determination of the question involved. A discussion of it at this time would be purely academic, and any conclusion arrived at with reference to it would be *obiter*. The same would be true as to a discussion and decision of the question whether, though the contract, so far as it included work done within the city, was invalid, it was valid as to work done without the city limits; for if the contract was valid, it applied to any work which might be done under it within or without the city.

4. It is insisted that since the jury found in favor of Hadalin, [13] who had general charge of the work, thus acquitting him of negligence, the company was entitled to a judgment notwithstanding the verdict against it. The question presented by this contention has practically been foreclosed by this court by the decisions in *Verlinda v. Stone & Webster Eng. Corp.*, 44 Mont. 223, 119 Pac. 573, and *Melzner v. Raven Copper Co.*, 47 Mont. 351, 132 Pac. 552. It is true that the verdict in each of these cases was silent as to the servant who was made codefendant with the master, while here it is in favor of the servant.

But we think the formal acquittal of the servant or agent through whose wrong the injury was done should not deprive the plaintiff of what the jury has given him, if the evidence shows that he has suffered wrong. As was said in *Verlinda v. Stone & Webster Eng. Corp.*, *supra*: "The conclusions reached by jurors are sometimes inexplicable. Often they arbitrarily find against one party and in favor of another without any apparent reason; but, if the evidence justifies the verdict as to the party held, there is no reason why it should not be deemed good as to him, notwithstanding there is no finding as to the other. It seems to us that the better rule is that, if the evidence is such that the jury might have found against both the master and the servant, the plaintiff should not be denied his recovery against the master because the jury were unable to agree upon a verdict against the servant, or arbitrarily disregarded the evidence tending to show negligence on the part of the servant." There are cases which adhere to the rule which counsel invoke. *Doremus v. Root*, 23 Wash. 710, 54 L. R. A. 649, 63 Pac. 572, *Morris v. Northwestern Improvement Co.*, 53 Wash. 451, 102 Pac. 402, and *Hayes v. Chicago Telephone Co.*, 218 Ill. 414, 2 L. R. A. (n. s.) 764, 75 N. E. 1003, are in point. We prefer, however, as indicated by the decision in *Verlinda v. Stone & Webster Eng. Corp.*, *supra*, to follow the doctrine announced by other courts: That where the jury arbitrarily acquits the servant or agent through whose negligence the wrong was done, the verdict against the principal ought to be allowed to stand; the reason being that the plaintiff should not be concluded by the capricious conduct of the jury. (*Illinois Central R. Co. v. Murphy's Admr.*, 123 Ky. 787, 11 L. R. A. (n. s.) 352, 97 S. W. 729; *Gulf etc. Ry. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744; *Texas & P. Ry. Co. v. Huber* (Tex. Civ. App.), 95 S. W. 568.) This doctrine may not be strictly logical, but it is equally as logical as that announced in the cases cited; for under the rule followed by them, the plaintiff is deprived of his right of recovery on purely technical grounds. But aside from this consideration, for aught that we can gather from the record, the jury in

this case did not arbitrarily or capriciously acquit Hadalin. Upon the theory that the work was being done by the company through Odenwald and Hadalin, both being its servants, the jury may have concluded that since Odenwald had direct, personal supervision, it was his duty, and not that of Hadalin, to take precautions for the safety of the employees, and that the company should be held because of his failure to perform the duty delegated to him. From this point of view, Hadalin was an intermediate agent, and ought not to have been held liable for Odenwald's dereliction.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

MARONEN ET AL., APPELLANTS, v. ANACONDA COPPER MINING CO., RESPONDENT.

(No. 3,269.)

(Submitted October 24, 1913. Decided November 24, 1913.)

[136 Pac. 968.]

Master and Servant—Mines and Mining—Personal Injuries—Death—Nature of Right of Action—Safety Cage Act—Defenses—Duty of Master—Statutes.

Mines and Mining—Personal Injuries—Death—Nature of Right of Action.

1. *Held* that, since the right of action given by section 6486, Revised Codes, to the heirs or personal representatives of one whose death was caused by the wrongful act of another, though distinct from that which the deceased would have had in case he had only been injured, is the same in character and dependent upon the same facts, the heirs of a miner who himself was responsible for his death because of his violation of a rule of defendant company requiring him to close the doors of a safety cage while being hoisted to the surface, were barred of recovery; deceased could not have maintained the action because of his contributory negligence, and therefore his heirs cannot do so.

[As to the duty of mine owners to prevent injury to their employees, see note in 87 Am. St. Rep. 557. As to the liability of a mine owner for injuries to an employee caused by a falling roof, see note in Ann. Cas. 1912B, 577.]

Same—Safety Cage Act—Negligence—Defenses.

2. In an action in which damages were sought to be recovered for the death of a mine employee, charged to have been due to legal negligence of defendant in attempting to hoist him to the surface of the mine in a cage the doors of which had not been closed as provided in the Safety Cage Act (Rev. Codes, sec. 8536), defendant was not, because of the fact that the statute makes omission in this respect punishable by a fine, limited to those defenses available in a criminal action, but could plead any of the defenses ordinarily interposed in negligence cases.

Same—Actions—Common Law—Abolition of Forms—Statutory Construction.

3. While the common-law forms of action have been abolished in Montana, the principles underlying them have not been changed, and a reference to both such forms and principles is frequently of aid in the construction of statutes.

Same—General Findings—Effect.

4. In a personal injury action tried by the court without the aid of a jury, a general finding in favor of defendant company is equivalent to a finding in its favor upon every issue necessary to support the judgment.

Same—Safety Cage Act—Duty of Master—Statutes.

5. *Held*, that the provision of section 8536, Revised Codes, requiring that the doors of the cages used in shafts of deep mines must be closed when lowering or hoisting the men, was not intended to make it obligatory upon mine operators to employ a station-tender at each station to open and close the cage doors, where only a small number of miners is engaged in active mining, and does not prohibit, either expressly or impliedly, the imposition of the duty of opening and closing them upon a miner, provided he be capable, understands the method pursued in fulfilling the additional requirement and is not encumbered with work which would interfere with its discharge.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Flora Maronen and others against the Anaconda Copper Mining Company. From a judgment for defendant and an order denying a motion for new trial, plaintiffs appeal. Affirmed.

Messrs. Maury, Templeman & Davies, for Appellants, submitted a brief and one in reply to that of defendant; *Mr. John O. Davies* argued the cause orally.

The complaint in this case states a cause of action in favor of the plaintiffs and against the defendant. The action is based upon section 8536 of the Revised Codes. A violation of the provisions of the section is a wrongful and unlawful act. It is a

crime. The committing of a crime in this state is both a wrongful and unlawful act. (Sec. 5051.) Section 6486 gives to these plaintiffs a right of action against the defendant for causing the death of their husband and father, respectively, for any wrongful or unlawful act. Section 6040 says that "Every person who suffers detriment from the unlawful act or omission of another may recover from the person a full compensation therefor in money, which is called damages." The fact that a penalty is attached to the violation of section 8536, and that the violation of it is made a crime, does not preclude the person injured by reason of the violation from bringing an action to recover damages for the injuries which he sustained. (Secs. 8089, 8101.)

The courts allow the injured person to recover for injuries received by reason of the violation of a statute enacted for the protection of such person, unless they can from the language of the statute read a specific intent upon the part of the legislature to exclude any right of action except the one given by the statute; and unless the penalty prescribed by the statute is given to the person injured, the court will not read into it, any such specific intent on the part of the legislature. (*Groves v. Wimborne*, 2 Q. B. (1898) 402; *Fahey v. Jephcott*, 2 Ont. Law Rep. 449, 1 Brit. Rul. Cas. 616; *Stehle v. Jaeger Automatic Mach. Co.*, 220 Pa. 617, 14 Ann. Cas. 122, 69 Atl. 1116; *Wolf v. Smith*, 149 Ala. 157, 9 L. R. A. (n. s.) 338, 42 South. 824.)

The failure of the defendant to comply with the terms of section 8536, and close the doors on its cages when it was lowering or hoisting men, makes it liable. (*Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Chicago B. & Q. Ry. Co. v. United States*, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. Rep. 612; *Luken v. Lake Shore etc. Ry. Co.*, 248 Ill. 377, 140 Am. St. Rep. 220, 21 Ann. Cas. 82, 94 N. E. 175; *Glucina v. F. H. Goss Brick Co.*, 63 Wash. 401, 42 L. R. A. (n. s.) 624, 115 Pac. 843.) This being so, in an action of this kind it is not necessary to charge negligence; an action may be brought directly upon the statute for a breach of its provisions. (*Monson v. La France Copper Co.*, *supra*; *Groves v. Wimborne*, *supra*.)

Are any of the defenses set out in the answer sufficient to constitute a bar to plaintiffs' cause of action as alleged in their complaint? In considering this question, we wish the court to bear in mind that this is not an action based upon negligence. No negligence is charged in the complaint. The defendant is charged with the commission of a crime, a wrongful and unlawful act, from which directly and proximately resulted the death of August Maronen. In fact, the complaint in this case charges the defendant with manslaughter, or criminal homicide. (*State v. Crean*, 43 Mont. 47, 114 Pac. 603; sec. 8295, Rev. Codes.) The only defenses permitted by our Code of manslaughter or homicide are that the homicide must be either excusable or justifiable, as defined by sections 8299, 8300, 8301. We submit that no defense not found within these sections should be permitted to be set up by the defendant as a defense to this action; and that the provisions found in them are as applicable to civil actions for criminal homicide as they are to criminal prosecutions. The first defense found in the answer is assumption of risk. This court has committed itself to the proposition that assumption of risk rests upon the common-law maxim of *volenti non fit injuria*: that one who consents to an act will not be heard to say that he was injured thereby. The law will not permit a man to consent to an unlawful act. No man can consent that another commit an unlawful act against him. (*Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230; *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869; *Thomas v. Riley*, 114 Ill. App. 520; *Engelhardt v. State*, 88 Ala. 100, 7 South. 154; *Morris v. Miller*, 83 Neb. 218, 131 Am. St. Rep. 636, 17 Ann. Cas. 1047, 20 L. R. A. (n. s.) 907, 119 N. W. 458; *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538, 18 N. W. 473; *Grotton v. Glidden*, 84 Me. 589, 30 Am. St. Rep. 413, 24 Atl. 1008; *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869.)

The plea of contributory negligence, defendant's second defense, is not available. This plea is one of confession and avoidance. It necessarily assumes negligence upon the defendant's part, and where there is no negligence upon the defendant's part there can be no contributory negligence upon the plaintiff's

part. (*Birsch v. Citizens' Elec. Co.*, 36 Mont. 547, 93 Pac. 940; *Ohio Handle etc. Co. v. Jones*, 98 Ark. 17, 135 S. W. 455; *Linforth v. San Francisco Gas etc. Co.*, 156 Cal. 58, 19 Ann. Cas. 1230, 103 Pac. 320; *Wright v. Southern Ry. Co.*, 155 N. C. 325, 71 S. E. 306.) Negligence and contributory negligence both have been universally defined as meaning inadvertence in respect to the conduct of the person charged with negligence or contributory negligence. Inadvertence is no excuse or offset for a public offense, for a crime, for willful injury, for willful or wanton conduct, or criminal negligence, or for gross negligence, or for any breach of duty which is of a higher nature than simple inadvertence or negligence. (*Hawks v. Slusher*, 55 Or. 1, Ann. Cas. 1912A, 491, 104 Pac. 883; *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269, 68 N. E. 238; *Matthews v. Warner*, 29 Gratt. (Va.) 570, 26 Am. Rep. 396.)

Defendant's third defense is based upon negligence of fellow-servants. If there was any duty devolving upon any of the fellow-servants of Maronen to close the doors, that duty was a nondelegable duty, and any negligence upon the part of such fellow-servants was the negligence of the master, and the master is responsible. (*Monson v. La France Copper Co.*, *supra*.)

As to each of the questions of law above discussed, we desire to call the court's particular attention to the case of *Groves v. Wimborne*, *supra*. This case more closely resembles the present one than any other case which the writer has been able to find. It discusses all three of the questions above considered and reaches the same conclusions which is contended for above.

Messrs. C. F. Kelley, L. O. Evans, W. B. Rodgers and D. Gay Stivers, for Respondent, submitted a brief; *Mr. Evans* argued the cause orally.

The complaint fails to state a cause of action. It does not plead, and it is stated by counsel that the omission to do so is intentional, that the act of hoisting plaintiff's decedent upon the cage in question without the gates being closed was negligently done, and, in short, neither the term "negligent" or any equiva-

lent for it is anywhere used in the complaint in connection with the acts or omissions of the defendant relied upon to support the action, although the term "wrongful" and "unlawful" are used. Under the facts set forth in the complaint, it is negligence alone on the part of the defendant which must be relied upon to support the action. Negligence or its equivalent must be directly averred, or such facts must be stated as that a presumption of negligence necessarily arises. It is sufficient that the acts complained of be alleged, coupled with an allegation that the same were negligently done, but anything short of this seems to be insufficient under the authorities. (*Bralley v. Norfolk & W. Ry. Co.*, 66 W. Va. 462, 66 S. E. 653; *Forquer v. North*, 42 Mont. 272, 112 Pac. 439; *Wylar v. Ratican*, 150 Mo. App. 474, 131 S. W. 155; *Anderson v. Western Union Tel. Co.*, 85 S. C. 252, 67 S. E. 232, 477; *Silvera v. Iverson*, 125 Cal. 266, 57 Pac. 996.)

The evidence shows that the cage in question had been properly encased in steel, furnished with permanent doors of solid steel casing as required by law, the doors were in place and in good working order at the time of the accident. These doors obviously cannot be kept closed, but must be continuously opened and closed by the employees as they proceed with their work. The duty that was intended to be imposed as a primary duty upon the defendant was done in this case. All that the legislature can be reasonably presumed to have required the employer to do was to properly equip the cages, see that the doors were on and in proper working condition, and employ competent employees. If in carrying out the details of the work the employee failed in his simple duty, it certainly was not the intention to impose any criminal penalty on the employer. (*Manning v. App Con. Gold Min. Co.*, 149 Cal. 35, 84 Pac. 657; *Richardson v. El Paso Con. Gold Min. Co.*, 51 Colo. 440, 118 Pac. 982.)

The construction of this statute upon this proposition has never, to our knowledge, been directly submitted to or passed upon by this court. The statute, of course, requires that the doors be closed, when lowering or hoisting men. Upon failure to so close the doors, there is necessarily a violation of the Act

by someone, but, we submit, a reasonable view of the Act will not carry this criminal responsibility past the direct violator to the employer, who has done everything to comply with the law that in reason could be asked.

But counsel contend that because in the complaint in this action the acts of the defendant complained of are not designated as having been negligent, a different case is presented from the *Osterholm Case* (40 Mont. 508, 107 Pac. 499). In this case, the claim is made that the defendant is liable because it had failed to comply with the Safety Cage Act. In the *Osterholm Case*, the charge was also that the defendant had failed to comply with the terms of the Act. If the defendant in this case cannot be held responsible because of its negligence, which would be determined and measured by the fact that it had not complied with the statute, then it certainly cannot be held responsible at all, because no proposition of law could be laid down more clearly than this court in the *Osterholm Case* laid down the law that no new right of action was given plaintiff; nor were any of its common-law defenses taken away by the Act, its sole effect upon the civil action being to establish the question of primary negligence. Counsel's contention that a different situation is presented because this action is not brought upon the theory of negligence, but is based upon a wrongful act or crime of the defendant, has also been disposed of in the recent case of *Melville v. Butte-Balaklava Copper Co.*, 47 Mont. 1, 130 Pac. 441. That case, while based upon an alleged violation of the penal Act known as "the eight-hour law," was otherwise and in theory exactly the same as this, the complaint not alleging in terms that the defendant's acts were negligent, but that they were wrongful and unlawful.

The evidence showed that it was the duty of Maronen and his fellow-servants, particularly of Maronen because of his getting first upon the cage, to close the gates upon the north side, the side from which he afterward fell. Where a duty incumbent upon a master is intrusted to a servant and made a part of the duties of his employment, the failure to perform such duty on

the part of the servant cannot be charged by such servant as negligence on the part of the master. The sole and primary negligence is that of the servant. In this case, not alone was it Maronen's duty under the general custom and rule prevailing in the mine at the time of the accident, and clearly a part of the general duties of his employment, but the proof shows that he had been but a short time before positively and definitely ordered, to close the gates on the cage before riding upon the same. The person upon whom was devolved the duty to perform the act required could not fail in this duty and then complain of the master. (*Junior v. Missouri Electric L. & Power Co.*, 127 Mo. 79, 29 S. W. 988; *Carr v. Manchester Electric Co.*, 70 N. H. 308, 48 Atl. 286; *Memphis & C. R. Co. v. Graham*, 94 Ala. 545, 10 South. 283; *Chicago & N. W. R. Co. v. Snyder*, 117 Ill. 375, 7 N. E. 604.) The last case above cited is one where the duty which the servant failed to perform was an act required by a penal statute, and the case is thus similar to the present case. See *Guenther v. Lockhart*, 61 Hun, 624, 16 N. Y. Supp. 717, a case based upon the failure of an employer to furnish safety doors, as required by a penal elevator Act. For further authorities denying servants the right to recover, where the servants themselves had failed to perform their duties in taking specific measures to make the work or place safe, see *Conroy v. Clinton*, 158 Mass. 318, 33 N. E. 525; *Martin v. Louisville & N. R. Co.*, 23 Ky. Law Rep. 798, 64 S. W. 417; *Hogan v. Field*, 44 Hun (N. Y.), 72; *Watts v. Boston Tow Boat Co.*, 161 Mass. 378, 37 N. E. 197; *Preston v. Ocean Steamship Co.*, 33 App. Div. 193, 53 N. Y. Supp. 444.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiffs are, respectively, the surviving children and widow of August Maronen, deceased, and prosecute this action for damages on account of the death of the father and husband by the alleged wrongful act of the defendant. The complaint recites the relationship of the plaintiffs to the deceased and al-

leges that on September 7, 1911, August Maronen was an employee of the defendant company engaged in underground mining; that the company was carrying on mining operations through the Mollie Murphy shaft, a vertical shaft, more than 300 feet deep; that while in the discharge of his duties as such employee, and while at the 1,200-foot level in the shaft, he entered one of the defendant's mining cages for the purpose of being hoisted to the surface; that the defendant hoisted him from the 1,200-foot level to about the 1,000-foot level in the shaft when Maronen fell from the cage, receiving injuries from which he died. The gravamen of the charge is that the defendant hoisted Maronen without having closed the cage doors, and because of this fact alone the accident occurred. The act or omission is charged to have been wrongful and unlawful.

The answer admits the employment and the operations of the defendant company through the Mollie Murphy shaft; that while being hoisted through that shaft and at about the 1,000-foot level, and while the cage doors were not closed, Maronen fell from the cage, receiving the injuries from which he died, and that if the doors had been closed he would not have fallen from the cage. All other allegations of the complaint are denied; and in addition the defendant pleaded assumption of risk, negligence of fellow-servants, and that the decedent's death was due to his own fault, neglect, and disobedience of orders. These affirmative allegations were traversed by reply, and the cause, being at issue, was tried to the court without a jury and resulted in a judgment for defendant, from which judgment and an order denying them a new trial the plaintiffs prosecute these appeals.

The complaint charges the defendant with violating section 8536, Revised Codes, which makes it unlawful for any person or corporation to carry on mining operations through a vertical shaft more than 300 feet deep, unless the shaft is equipped with a safety cage with steel doors, and said doors "must be closed when lowering or hoisting the men," except that when sinking

only the doors need not be used. For a violation of any of the provisions of the section a penalty is prescribed.

Practically all of appellants' preliminary hypotheses may be conceded at once, in substance if not in the form in which they are expressed, viz.: That section 8536 is a penal statute and its violation is a crime; that section 6486, Revised Codes, gives to these plaintiffs a right of action against this defendant, provided the defendant's wrongful act or neglect was a proximate cause of August Maronen's death; that the fact that a penalty is attached to a violation of section 8536 does not render the defendant immune from civil liability; and that the duty to close the cage doors when men are being lowered or hoisted is an absolute one, in the sense that the employer will not be heard to say that by the exercise of ordinary care he cannot comply with the requirement. The foregoing questions aside, and we are brought to a consideration of the character of this action and, as an incident thereof, the defenses, if any, which are available.

There is not any contention made that the defendant company had not fully complied with the law in providing and properly equipping the cage in use. The only charge of wrongdoing is in failing to close the cage doors before attempting to hoist employees.

That section 8536 does not create any right of action or destroy any defense available at the time of its enactment are questions set at rest by the former decision of this court. (*Osterholm v. Boston & Mont. Con. C. & S. Min. Co.*, 40 Mont. 508, 107 Pac. 499.) In the absence of some statute creating this right of action, these plaintiffs would be remediless, for it was [1] the rule at common law that, for the death of one person caused by the wrongful act of another, the law furnished no remedy by civil action (*Dillon v. Great Northern R. Co.*, 38 Mont. 485, 100 Pac. 960); and it was to supply this lapse that Lord Campbell's Act was adopted in England, and statutes of the same general character have been enacted in this country. Our own provision is found in section 6486, above, which declares that when the death of one person, not a minor, is

caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. It is by virtue of that section that these plaintiffs are now in court; and the character of this action and the defenses available are to be determined from a construction of that section. The statute does not deal with questions of pleading, and the facts necessary to be stated in any given instance depend upon the character of the right asserted. In *Melville v. Butte-Balaklava Copper Co.*, 47 Mont. 1, 130 Pac. 441, we gave to this provision of the law our most earnest consideration. Its history was traced and its purpose determined. There was involved directly the inquiry: "Do the words of the statute, 'wrongful act or neglect of another,' imply actionable wrong or negligence toward the deceased or toward the surviving wife and children?" After a thorough examination of the subject, in the light of the history of the provision and its amplification by other tribunals, Chief Justice Brantly, speaking for the court, said: "The meaning of the expression 'wrongful act or neglect of another' thus became established and clearly limited to those cases only wherein the death is wrongful as against the deceased and to preclude recovery when death was due to the decedent's own fault." Referring to the legislative history and the former decisions of this court which recognize the rule that under this statute recovery can be had only in a case in which the deceased was himself without fault, the Chief Justice proceeded: "The interpretation thus given the statute by the legislature, and impliedly by these decisions of this court, has become so firmly established as the rule of decision in this jurisdiction that we do not feel justified in departing from it. To sustain the plaintiffs' contention would be to adopt an interpretation which the legislature never intended that the statute should have and thus destroy defenses of which defendant cannot be deprived, except by Act of the legislature. If a change should be wrought, it is the office of that body to make it, and not of this court"—and concluded by quoting from the opinion of the supreme court of the United States in *North-*

ern Pacific R. Co. v. Adams, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408, a carrier and passenger case where a like statute was considered, as follows: "The two terms, therefore, 'wrongful act' and 'neglect,' imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act or an unintentional act with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed but only injured. The company is not under two different measures of obligation, one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages."

The rule of law is, then, settled in this state that, while the right of action given in section 6486 to the heirs or personal representatives is independent of that which the deceased would have had if he had survived his injury, yet it is of the same character and depends upon the same facts; and the inquiry whether a given state of facts constitutes a cause of action in favor of the surviving widow and children depends upon the answer to the inquiry: Would the same facts, if stated by the injured man, constitute a cause of action in his behalf? That the allegations disclosing a breach of a statutory duty charge legal negligence, and that this complaint states a cause of action for damages for negligence, may be conceded even though the word "negligent" or "negligently" is not used.

But the immediate question before us is not whether the complaint states *a cause of action*, but whether the facts alleged constitute a cause of action, independently of the element of negligence. We might answer this interrogatory by reference to the foregoing decisions of our own court and conclude this discussion upon the evidence but for the earnestness with which counsel for appellants contend that, because the act or omission charged in this instance amounts to a crime, the defendant is limited to those defenses only which would be available to it

in a criminal action in which it was defendant, prosecuted by the state upon indictment or information charging the unlawful killing of August Maronen. The pleas available in a criminal action are enumerated in section 9209, Revised Codes: "There are four kinds of pleas to an indictment or information. A plea of: (1) Guilty. (2) Not guilty. (3) A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty. (4) Once in jeopardy"—but these are declared to be applicable to a charge presented by indictment or information and they are not applicable to civil actions. There is not any more reason for applying the provisions of section 9209, above, to this action than there is for invoking the other rules of criminal procedure. Counsel for appellants would scarcely admit that in all actions of this character the county attorney must appear for the plaintiff; that the action must be initiated by filing a complaint, indictment, or information; that defendant should be brought into court by warrant; that the proceeding might be commenced in a justice of the peace court and defendant be entitled to a preliminary examination; that the pleas must be made orally; that the defendant should be entitled to twice the number of peremptory challenges allowed the plaintiffs; that plaintiffs should be compelled to sustain the burden of proving the charge made by evidence beyond a reasonable doubt; that a jury trial could not be waived; and that a unanimous verdict only could be returned—and yet the reason for invoking one provision of the Code of Criminal Procedure is just as cogent as that in favor of any other one. Counsel err in assuming that the ordinary defenses available in negligence actions never were applicable to a charge which amounts to a crime when made in a civil action. Aside from the few fundamental principles enumerated in the Constitution, we have but two sources to which to resort in order to determine rules of substantive law or law of procedure: The Codes and the common law. "Law is a solemn expression of the will of the supreme power of the state." (Rev. Codes, sec. 3550.) "The will of the supreme power is expressed: (1) By

the Constitution. (2) By statutes." (Sec. 3551.) "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, or of the Codes, is the rule of decision in all the courts of this state." (Sec. 3552.) There is not any rule of the Constitution or provision of the Codes which lends support to the view for which appellants contend, and we are equally certain that such a rule was not invoked at common law.

While the common-law forms of action have been abolished in this state, the principles which underlie them have not been changed, and a reference to the forms as well as the principles not infrequently aids in determining the character of a right or a remedy. The Lord High Chancellor of Great Britain in his recent address to the American Bar Association, in referring to the common law with special reference to its growth and development, said: "Its paradox is that in its beginning the forms of action came before the substance. It is in the history of English remedies that we have to study the growth of rights." If August Maronen had not been killed but only injured and had brought his action for damages against this defendant charging the violation of this same statute as a proximate cause of his injury, would his complaint state a cause of action independently of the element of negligence? At common law the injured party had his remedy in trespass or by an action on the case, dependent upon the character of the act which caused the injury, but it was immaterial whether the wrongful act amounted to a crime or only a tort. If the injury was the immediate and direct result of the wrongful act, the remedy was sought in trespass; but if the injury was, as to the act complained of, consequential or arose from nonfeasance, then the remedy was by an action on the case. To illustrate: (1) If the defendant had struck Maronen with the cage or had thrown him from it, his form of action would have been trespass, and, if the injury resulted from the defendant's negligence, the action would not have differed from any other negligence action so far as it affected the defenses available; but, if the injury resulted from

defendant's intentional act, then a plea of justification alone would have been available. (2) But for the injury arising from his fall from the cage which resulted from the omission to close the cage doors, his action would have been on the case, and negligence must have been alleged. (*Fleming v. Lockwood*, 36 Mont. 384, 122 Am. St. Rep. 375, 13 Ann. Cas. 263, 14 L. R. A. (n. s.) 628, 92 Pac. 962.) So far as this action is concerned, these observations upon the rules of pleading at common law are somewhat more speculative than practical. They answer appellants' contention and aid in determining the line of demarcation between the class of personal injury actions in which negligence is not a necessary element and the class in which the allegation of negligence is necessary.

This complaint states a cause of action for damages caused by negligence, but it does not state a cause of action upon any other theory; and, having set forth facts which disclose legal negligence on the part of the defendant, it was permissible for it to interpose any of the ordinary defenses applicable in negligence cases. Possibly there may be found authorities which dispute this conclusion. The Illinois court has reached a different result, but upon a different penal statute. Aside from the Illinois cases, the decisions cited by counsel for appellants are not in conflict with our conclusion. As we view them, they are not in point in fact or in principle. We do not think there is any analogy between this case and an action for damages caused by dueling, assault and battery, or an abortion. But, whatever may be said of the authorities elsewhere, the decision in *Osterholm v. Boston & Mont. Con. C. & S. Min. Co.*, above, is decisive of the question in this state. In our opinion, however, the determination of this controversy is to be found in the merits as disclosed by the evidence, and it is of little consequence by what name the successful defense is designated. The trial court heard the witnesses, observed their demeanor while upon the witness-stand, and every presumption will now be indulged in favor of the correctness of its conclusions. If there is substantial evidence to support any of defendant's special defenses or from

which a fair inference to that effect can be drawn, then this court will not interfere.

On September 7, 1911, the deceased, with Powers, Conroy, Ryan, and Updegraff, all miners employed by the defendant company, were directed to cement up a leak in a bulkhead in a drift on the 1,200-foot level from the Mollie Murphy shaft where gas was escaping. In the course of their operations Updegraff became affected by the gas, and Ryan, Maronen, and Conroy took him upon the cage, and without closing the doors the signal to hoist was given, and when at the 1,000-foot level or thereabouts Maronen fell from the cage and was killed. The evidence given upon the trial is very meager, and there are not any disputed questions of fact. Plaintiffs called Mrs. Maronen, who testified to the relationship existing between them and the deceased, to the habits and earning capacity of the deceased and his contributions to these plaintiffs. Then, upon an admission by the defendant as to the expectancy in life of one of Maronen's age as shown by the standard tables of mortality and as to the cost of an annuity, plaintiffs rested their case. The defendant called the mine foreman, the shift-boss, and two of the men who were with Maronen when he fell from the cage. At the close of their testimony the cause was submitted without rebuttal. To set forth even a brief abstract of the testimony of defendant's witnesses would not serve any purpose, useful or otherwise. We have studied it carefully, and our conclusion is that it tends to prove the following facts: That at the time of this accident, and for some considerable time prior thereto, there were but two men regularly employed on each shift in the Mollie Murphy shaft, and for this reason there were not any station-tenders, but the men on shift or working in the shaft when they were being hoisted or lowered were required to open and close the cage doors themselves; that as to Maronen this duty was imposed by specific instructions given him individually; that the rule required the first man upon the cage to close the door on his side of the cage; that, at the time these men entered the cage for the purpose of bringing Updegraff to the surface, Maronen was

the first man to enter the cage; that he did not close the door next to where he stood; and that it was through that door that he fell. The cause of his fall is not disclosed. There is a bare suggestion that after the cage started he became affected by the gas. Just before starting, Ryan asked Maronen and Conroy how they felt and received a response from each that he felt fine. With the evidence from which these fact conclusions are drawn [4] before it, the trial court made a general finding in favor of the defendant which is equivalent to a finding in defendant's favor upon every issue necessary to support the judgment. (*City of Butte v. Mikosowitz*, 39 Mont. 350, 102 Pac. 593; *Hansen v. Larsen*, 44 Mont. 350, 120 Pac. 229.) There is some evidence that the rule requiring the miners to close the cage doors was habitually violated by Conroy and possibly by others, but there is not any evidence that such violations were countenanced by the defendant; on the contrary, it is disclosed that, when some miners in its employ were detected violating the rule a short time before this accident occurred, they were immediately discharged. Neither do we attach importance to the fact that, at the precise time of this accident, Maronen's place of regular employment was not in the Mollie Murphy shaft. He had been working there but a short time before, was familiar with the conditions, and understood the duty which was imposed upon him.

When this safety cage statute in its present form was enacted, the legislature understood that a corporation is an intangible entity, and that the duty to close the cage doors must of necessity be imposed upon some servant of the corporation. If a corporation employed a man whose sole duty it was to open and close the cage doors at a particular station, and such station-tender neglected his duty when he himself was being lowered or hoisted, with the result that he was killed or injured, neither his heirs nor personal representatives in the one instance, nor he himself in the other, could recover, for the very obvious reason that he would be responsible for the result—would be the sole author of his misfortune. We are not called upon in this instance to

determine to what extent a corporation operating under this statute may impose upon its workmen generally the duty to close the cage doors. We are not required to complicate the question before us in order to make its solution more difficult.

At the time this injury occurred there were only two men regularly employed on each shift on the work reached through the Mollie Murphy shaft, and the question for solution is: [5] Was it the duty of the defendant corporation, under those circumstances, to employ station-tenders (a man for each station, where the two miners or either of them might be sent to work), whose sole duty it would be to open and close the cage doors, or in this particular instance, when five men were lowered to perform a particular piece of work out of the ordinary, was it incumbent upon the employer to hire a sixth man to go along for the special purpose of closing the cage doors? This statute does not impose such a duty in terms. Its provisions are to be given a reasonable construction, in view of the evils sought to be remedied by its enactment. Notwithstanding its penal character, it is a police regulation designed to protect the lives of the men engaged in the extrahazardous occupation of deep underground mining. But it was not intended to lay an embargo upon the mining industry, and consequently it does not contemplate that it shall be necessary that two or three men be employed to wait upon one man who is actively engaged in mining. It does impose a duty and contemplates that in its discharge someone shall be employed to act for the corporation in performing the manual labor of opening and closing the cage doors. If the man so engaged is capable, understands the method to be pursued in fulfilling the obligation of his employment, and is not encumbered with other duties which tend to interfere with the discharge of the mechanical operation of opening and closing the doors, it would seem that the corporation discharged its duty in the first instance, though it might thereafter be liable to someone else injured by reason of the failure of this agent or servant to discharge the duty assigned him; in other words, so long as the other duties imposed upon

the man who is to open and close the cage doors do not interfere with his work of opening and closing the doors, the statute does not expressly or impliedly prohibit the imposition of such dual duties or make the employment of a man, whose sole duty it shall be to open and close the doors, imperative. The evidence tends to show that Maronen was an experienced miner and a capable man; that in each door opening of the cage used in the Mollie Murphy shaft were double doors which closed inwardly and locked or fastened by a simple device; that each door weighed less than fifteen pounds and opened and closed easily; that the doors upon this cage were in good working condition, and that it required no technical knowledge or experience, and very little labor, to close them; that, so far as the defendant was concerned, the work which Maronen was required to do upon the occasion when he was injured had no relation whatever to, and could not interfere with, the discharge of his duty to close the cage door; that he had ample opportunity to close the door before the cage was hoisted; that it was his duty to do so; that he failed in the discharge of that duty and paid the penalty with his life. The evidence does not show or tend to show that he was so engrossed with his attention to Updegraff that he could not close the door or that in the excitement he forgot to do so. Conroy likewise failed to close the door on his side of the cage and explains his remissness by saying: "It was dangerous, but we took the chance, I guess."

Our conclusion is that the trial court was justified in finding that Maronen was to all intents and purposes a station-tender in the sense that it was his duty to close the door when he entered the cage to be hoisted, and that his death resulted from his failure to discharge a duty which could be and was rightfully imposed upon him; and, because he could not have succeeded upon these facts in an action if he had been injured only, neither his heirs nor personal representatives can succeed in this one.

The judgment and order denying plaintiffs a new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

HOWELL, APPELLANT, v. BENT ET AL., RESPONDENTS.

(No. 3,304.)

(Submitted October 25, 1913. Decided November 29, 1913.)

[137 Pac. 49.]

Water Rights—Res Adjudicata—Evidence—Inadmissibility—Wrongful Diversion of Water—Action for Damages—Misjoinder of Parties—Harmless Error.

Water Rights—Res Adjudicata—Evidence—Inadmissibility.

1. Where in a water right suit a decree of the United States circuit court had *inter alia* granted injunctional relief against interference with the right of one of the parties to a sufficient flow of water to satisfy his claim, the presumption obtained that the court also determined that the waters of the creek in controversy did not sink and become lost before they reached the lands of such party; evidence to the contrary was, therefore, inadmissible, until a change in the conditions subsequent to the decree was shown.

Same—Wrongful Diversion—Action for Damages—Misjoinder of Parties.

2. Under the rule that where two or more parties act each for himself in producing a result injurious to another, they cannot be held jointly liable for the acts of each other, nor, in the absence of statutory authorization, be sued in one action for the entire damage, either with or without an apportionment to each of his share of the damage, an action at law against several defendants jointly for injury to crops on account of the alleged wrongful diversion of the waters of a creek by the defendants severally did not lie.

Same—Equity Actions—Statutes.

3. Section 4852, Revised Codes, authorizing plaintiff to make all persons who have diverted water from a stream parties defendant for the purpose of having the relative rights and priorities of all of them determined, and under which damages may be assessed against those who have wrongfully diverted any of such water, has reference only to a suit in equity in which the damages claimed are a mere incident, and not to an action at law of the character mentioned in paragraph 2, *supra*.

Appeal—Correct Judgment—Affirmance Notwithstanding Error.

4. Where plaintiff was not entitled to judgment in any view of the case as tried, it will not be reversed for error committed during trial.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

ACTION by T. N. Howell against Wallace Bent and others. Judgment for defendants, and plaintiff appeals from it and an order denying a new trial. Affirmed.

Mr. W. M. Johnston and *Mr. H. J. Coleman*, for Appellant, submitted a brief; *Mr. Johnston* argued the cause orally.

In behalf of Respondents, there was a brief by *Messrs. Nichols & Wilson*, and oral argument by *Mr. Harry L. Wilson*.

MR. JUSTICE SANNER delivered the opinion of the court.

Action by T. N. Howell to recover from Wallace Bent, Bert Bent, Michael Wrote, Tony Garcia, George Crosby, John Sadring, Charles Ingram, C. M. Young, W. R. Bainbridge, James Pauley, Tillman C. Graham, A. W. Adams and Curtis Beeler, as defendants, for injury to and loss of crops on account of the alleged wrongful diversion of the waters of Sage creek. Sage creek is a small stream which rises in Montana and flows into Wyoming, and upon it or its tributaries all the parties reside or have lands which require artificial irrigation for the successful raising of crops. The appellant possesses a right to 110 miner's inches of the waters of Sage creek for the irrigation of his lands, which lie in the state of Wyoming some miles below the lands of respondents, and this right is prior and superior to any that may be asserted by the respondents or any of them. For the purpose of utilizing his right the appellant has, since August 1, 1890, maintained a dam across said creek about a mile above his place, and also a ditch, tapping the creek at that point, of sufficient size and character to divert and conduct the water to his land. It is alleged that in the year 1908 the appellant tilled and cultivated 160 acres of his land in a good, husbandlike manner, constructed laterals from his main ditch so as to distribute the water over the land, planted and seeded a large portion of the land to alfalfa and wheat, and in all respects properly cared for the same. The burden of the complaint is set forth in paragraph 8 as follows: "(8) That said defendants, and each of them, in the years 1908, 1909 and 1910, had ditches tapping said Sage creek and its tributaries above the intake of plaintiff's said ditch; that when it became necessary to irrigate said crops of wheat and alfalfa in the year 1908, said defendants

and each of them tapped said Sage creek and diverted therefrom all of the waters of said Sage creek and its tributaries, and thereby deprived plaintiff of the use of any of the waters of said Sage creek and its tributaries for the irrigation of said crops, which deprivation and wrongful use of said water by said defendants continued throughout the entire irrigating season of that year; that plaintiff notified said defendants and each of them of his right to the said waters of Sage creek and its tributaries, and that they and each of them were diverting the same from plaintiff to his damage, and demanded that they allow said water to flow down said Sage creek in sufficient quantity to allow him to divert therefrom 110 miner's inches thereof, to which he was entitled; that notwithstanding such notice and demand from plaintiff, said defendants and each of them, from the commencement of the irrigation season and throughout the whole season, wrongfully and unlawfully diverted all of the waters of said Sage creek and its tributaries, and thereby deprived plaintiff of the use of any of said waters in that year; that by reason of said wrongful acts of said defendants, the plaintiff's aforesaid crops of wheat and alfalfa were entirely ruined and destroyed, and said alfalfa killed, and plaintiff suffered the entire loss of said crops by reason thereof and for no other reason."

To the complaint four separate answers were filed: one by Wallace Bent and Bert Bent, one by Beeler and Adams, one by Young, Ingram and Sadring, and one by Bainbridge. These answers differ slightly in detail, but the general effect of each of them is to raise an issue upon the material allegations of the complaint.

The trial was to the district court sitting with a jury, and after dismissal by appellant as to Tillman C. Graham, the verdict was for the respondents. Judgment on the verdict was entered, and appellant in due time presented his motion for new trial, which was denied. The cause is before us upon appeal from the judgment, and from the order denying the motion for new trial.

The brief of appellant assigns sixteen alleged errors. One of these relates to the pleadings, four to the instructions, and the remainder to rulings upon the evidence. No good purpose could be served by discussing these assignments in detail, because, for reasons presently to appear, the judgment must be affirmed in any event. Suffice it to say that we see no error in any of these rulings, except the admission of testimony to the effect that the waters of Sage creek sank and were lost between the ranches of respondents and that of appellant. We think this subject was not open to inquiry as between the parties to this action. The complaint alleges, and the respondents have admitted, that on [1] May 28, 1906, in the circuit court of the United States, ninth circuit, district of Montana, in an action involving the right to the use of the waters of Sage creek, wherein one W. A. Morris was plaintiff, the appellant herein was intervener, and the respondents or their predecessors in interest were defendants, such proceedings were had that the judgment and decree of that court was duly entered establishing the right of appellant to 110 miner's inches of the waters in said Sage creek and its tributaries as of August 1, 1890, and prior both in time and right to the rights of any of defendants. In and by this decree the defendants were enjoined from in any manner interfering with the rights of the present appellant, but were commanded to allow a sufficient amount of water to flow down to satisfy his claim whenever needed by him. While it is true the pleadings in that action are not before us, the decree itself—as admitted by the respondents—is of such a character that we must presume, in the absence of anything to the contrary, that the court had properly before it, not merely the relative rights of the parties in order of time, but the possibility of interference with the right of Howell on account of diversions above him. If at that time the waters of Sage creek sank and were lost between the ranches of respondents and that of appellant, no assertion of rights to such waters by respondents or their predecessors in interest, and no diversion of such waters by the respondents or their predecessors in interest, could constitute an interference

with Howell. In such a situation there would have been no occasion for the injunctive portion of the decree. As we cannot presume the decree to have been without foundation or meaning in any of its substantial particulars, it follows that the circuit court of the United States in entering the decree necessarily determined that at that time the waters of Sage creek did not sink and become lost between the ranches of respondents and that of appellant. (Rev. Codes, sec. 7917; *Lokowich v. City of Helena*, 46 Mont. 575, 129 Pac. 1063.) This conclusion is strengthened by the testimony in the record before us, as well as by the decision of the case in the circuit court of the United States in the first instance (*Morris v. Bean* [C. C.], 146 Fed. 423), and in the circuit court of appeals, where it was immediately affirmed (*Bean v. Morris*, 159 Fed. 651, 86 C. C. A. 519). It being the adjudicated fact that when the decree of the circuit court of the United States was entered the waters of Sage creek did not sink and become lost, no evidence to the contrary was admissible until a change in the conditions subsequent to the decree was shown.

But the error is of no avail because the plaintiff was not entitled to judgment. The complaint leaves one in some uncertainty as to whether the pleader intended to charge that the respondents acted jointly or severally in diverting the water. If jointly, it is not sustained by any evidence; if severally, then the complaint, the evidence presented by the appellant, and the instructions given to the jury at his instance were consistent, but were grounded upon a theory wholly untenable. It is well [2] settled that when two or more parties act, each for himself, in producing a result injurious to the plaintiff, they cannot be held jointly liable for the acts of each other; nor, in the absence of statutory authorization, can they be sued in one action for the entire damage, either with or without an apportionment to each of his share of the damage. In pursuing their course, [3] counsel for appellant doubtless proceeded upon the assumption that such authorization is to be found in section 4852, Revised Codes; but, as early as 1895, the law was declared other-

wise in *Miles v. Du Bey*, 15 Mont. 340, 39 Pac. 313. That case arose squarely upon the interpretation of section 1260, Fifth Division, Compiled Statutes of 1887, which is identical with section 4852, Revised Codes, and in deciding it this court held that an action like the one at bar will not lie, and that the section in question authorized the proceeding here employed only in a suit in equity to "settle the relative priorities and rights of all the parties to the water, or the use thereof, of the stream mentioned," in which the damages claimed are a mere incident. (See, also, *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523; *Beach v. Spokane Ranch & Water Co.*, 25 Mont. 379, 65 Pac. 111.)

We fully realize that the foregoing consideration is not made a matter of specific argument in the briefs before us, but it is argued that the judgment should be reversed and a new trial directed because of the errors assigned. If—as is the case—the [4] judgment is correct, if it could not in this action be other than it is, then the errors assigned could in no wise affect it; and we are forbidden, as well by the statute (Rev. Codes, sec. 6593) as by the rules of reason, to order a reversal (*Knipe v. Washoe Copper Co.*, 37 Mont. 161, 95 Pac. 129). Accordingly, the judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

GRORUD, RESPONDENT, v. LOSSL ET AL., APPELLANTS.

(No. 3,314.)

(Submitted October 25, 1913. Decided December 2, 1913.)

[136 Pac. 1069.]

*Malicious Prosecution—Corporations—Principal and Agent—
Malice — Presumptions — False Imprisonment — Damages—
Pleadings—Evidence—Discharge—Instructions.*

Malicious Prosecution—Corporations.

1. An action for malicious prosecution lies against a corporation, as well as against a natural person.

[As to the liability of corporations for false imprisonment, see note in 67 Am. St. Rep. 426; and as to their liability for malicious prosecution, see note in 59 Am. St. Rep. 595.]

Same—Agents—Liability of Corporation.

2. Where an agent of a corporation, in the discharge of his duties and within the apparent scope of his authority, does an act from which a third person suffers injury, the corporation is liable for the damages flowing therefrom, even though the agent may have failed in his duty to it or disobeyed its instructions; and, if the act is prompted by fraudulent or malicious motives, the agent's fraud or malice is imputable to the corporation.

Same—Corporations—Officers—Presumptions.

3. Where the president of a mercantile corporation had instituted a prosecution against one for larceny of its funds, the presumption arose that he was acting in its behalf; in the absence of evidence, however, that another corporation of which he was also president had any connection with the larceny charge, it could not be presumed that he was also proceeding in its behalf, and a motion for nonsuit as to the latter corporation should have been sustained in an action for malicious prosecution.

Same—Probable Cause—Malice—Presumptions.

4. While the plaintiff in an action for malicious prosecution must prove both the want of probable cause and malice, in order to make a *prima facie* case, the presence of the latter may be inferred by the jury where the absence of the former has been established.

Same — Evidence—Sufficiency—Conflicting Evidence—Defenses—Consulting Attorney.

5. Where the evidence as to the existence of probable cause for a criminal prosecution consisted of conflicting statements made by the plaintiff and the defendant, its credibility, with the inferences justly deducible from it, was a matter for the jury; hence, having concluded that the charge was without probable cause, they were justified, under the rule declared in paragraph 4, *supra*, to infer that defendant was prompted by malicious motives in preferring it, even though it appeared that defendant had consulted a county attorney before acting.

Same—False Imprisonment—Distinction.

6. Where an arrest and imprisonment are brought about by legal process but the prosecution is instituted and carried on maliciously

and without probable cause, it constitutes "malicious prosecution"; but if the arrest and imprisonment are accomplished without legal process, it is "false imprisonment," which gives a right of action whether prompted by malice or not.

Same—Arrest and Imprisonment—Presence of, not Indispensable—Instructions—Harmless Error.

7. A showing that plaintiff in an action for malicious prosecution was arrested, or imprisoned or held to bail is not indispensable, it being sufficient to sustain the action if it appears that he has maliciously and without probable cause been vexed and harassed by a criminal prosecution; hence, an instruction implying that proof of both arrest and imprisonment were necessary to warrant a verdict for plaintiff was error, but error in favor of defendant of which he was not in a position to complain.

Same—Damages Recoverable—Pleading—Mental Suffering.

8. In an action for malicious prosecution plaintiff is entitled to recover general compensatory damages for whatever injury he has suffered as the natural and necessary result of a charge of an infamous crime preferred against him by defendant; therefore, since mental anxiety and suffering flow naturally and directly from a groundless and malicious prosecution based upon such a charge, plaintiff need not specially plead damages in this regard in order to warrant recovery.

Same—Termination of Prosecution—Showing Necessity.

9. In an action for malicious prosecution, it must appear, by admissions in the pleadings or by the proof, that the prosecution on account of which plaintiff is suing is at an end.

Same—Discharge by Magistrate—Evidence of Want of Probable Cause—Instructions.

10. Where, after a full investigation of all the facts within the knowledge of the prosecuting witness, defendant prosecuted for a felony is discharged by a committing magistrate, such discharge is some evidence that the prosecution was groundless; hence, a requested instruction that the jury should consider the discharge only as evidence that the prosecution had terminated, but that it was not any evidence of a want of probable cause, was properly refused.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by A. A. Grorud against J. P. Lossl and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed as to defendants Lossl and the J. P. Lossl Company, and reversed as to defendant Divide & Gibbonsville Stage Company, with directions to dismiss the action as to it.

Messrs. Breen & Jones and Mr. Jos. C. Smith, for Appellants, submitted a brief; Mr. Peter Breen argued the cause orally.

Messrs. B. K. Wheeler, M. F. Canning and P. E. Geagan, for Respondent, submitted a brief; *Messrs. Wheeler and Canning* argued the cause orally.

The issue in this case is whether or not the defendants maliciously and without probable cause caused the arrest or prosecution of the plaintiff. In *Herzog v. Graham*, 9 Lea (Tenn.), 152, the court said: "Malicious prosecution is the procuring *the arrest or prosecution* under the lawful process on the forms of law, but from malicious motives and without probable cause." A clear and concise statement of the distinction between false imprisonment and malicious prosecution is to be found in the case of *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735, wherein it was observed that if the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. If it has been extrajudicial without legal process, it has been false imprisonment.

Anxiety and suffering should be taken into consideration by the jury in awarding damages in all cases of malicious prosecution. In the case of *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33, the court said: "The amount awarded is, to say the least, a moderate allowance for the humiliation and shame presumably suffered by the plaintiff by reason of a groundless charge of felony made against him." The party injured by reason of malicious prosecution is entitled to adequate compensation covering all the elements of the particular injury. Such elements of damage include loss of time, injury to fame, reputation, character and health, mental suffering, *etc.* (26 Cyc. 62.) Mental suffering, although not arising from bodily suffering, is an element of damage and malicious prosecution. (*McKinley v. Chicago etc. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Flam v. Lee*, 116 Iowa, 289, 93 Am. St. Rep. 242, 90 N. W. 70; *Wheeler v. Hanson*, 161 Mass. 370, 42 Am. St. Rep. 408, 37 N. E. 382; *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800.)

The great weight of authority is that the discharge of a person at a preliminary hearing by a justice of the peace is *prima*

facie, though not conclusive, evidence of want of probable cause. (26 Cyc. 38; *Plassan v. Louisiana Lottery Co.*, 34 La. Ann. 246; *Frost v. Holland*, 75 Me. 108; *Rosenkranz v. Hass*, 1 Misc. Rep. (N. Y.) 220, 20 N. Y. Supp. 880; *Smith v. Ege*, 52 Pa. 419; *Madison v. Pennsylvania R. Co.*, 147 Pa. 509, 30 Am. St. Rep. 756, 23 Atl. 764; *Jones v. Finch*, 84 Va. 204, 4 S. E. 342; *Vinal v. Core*, 18 W. Va. 1; *Eggett v. Allen*, 119 Wis. 625, 96 N. W. 803.) And the rule was approved of in *Fox v. Smith*, 26 R. I. 1, 3 Ann. Cas. 110, 57 Atl. 932, where the court said it seemed to be the generally accepted doctrine of the courts of this country. In Missouri it is held that a discharge by an examining magistrate is persuasive evidence that the prosecution was groundless. (*Brant v. Higgins*, 10 Mo. 728; *Sharpe v. Johnston*, 76 Mo. 660.) But the court below in this case did not even go so far as to say it was *prima facie* evidence but simply refused to instruct the jury that it was no evidence, and we submitted that it not only was some evidence, but by the weight of authority is *prima facie* evidence.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for malicious prosecution. The plaintiff had verdict and judgment. The defendants have appealed from the judgment and an order denying their motion for a new trial.

On behalf of the defendants the contention is made that the court erred in denying their separate motions for nonsuit, because it was not shown that either of the corporations authorized or had any connection with the prosecution on account of which this action was brought, and because the evidence failed to disclose that Lossl acted without probable cause. The contention is also made that the evidence is insufficient to justify the verdict, and that the court committed prejudicial error in charging the jury.

The prosecution of plaintiff arose out of the following circumstances: For the twenty-two months prior to June 12, 1911,

the plaintiff had been employed at Divide, in Silver Bow county, as the agent of the Oregon Short Line Railway Company and also of the American Express Company. The defendant J. P. Lossl Company was, during the same time, engaged in a general merchandise business at Wisdom and Dewey, some distance to the west of the line of railway, in Beaverhead county. The Divide & Gibbonsville Stage Company was engaged in the transportation of freight and passengers from Divide to Wisdom and other points to the west. J. P. Lossl was the president and manager of both corporations, and controlled their business. Goods purchased by the merchandise corporation were received at Divide and conveyed by the other corporation to Wisdom and Dewey. To provide for the payment of freight and express charges, the defendant Lossl would, from time to time, send to the plaintiff checks drawn in favor of the railway or express company—oftener in favor of the former—upon the bank at which the deposits of the defendant corporations were kept, usually amounting to \$150 at a time. In some instances a single check for this amount was sent, in others two or three checks aggregating this amount, and in others the amount would be larger, according to the amount of the charges to be met at the particular time. The sums thus sent covered also the compensation of plaintiff for the accommodation extended to the defendant corporations. This was fixed at \$15 per month. The plaintiff kept an account of the transactions between himself and the defendant corporations. In making his monthly remittances to the accounting officers of the railway and express companies, he would send the checks, which were accepted by these companies as cash, and collected in due course from defendants' bank. At the end of each month plaintiff remitted to Lossl a statement, which was supposed to contain a list of all the checks received by him on account of either of the defendant corporations, as well as of the items of charges in favor of the railway and express companies. Usually this statement showed a balance in favor of the defendant corporations. This course of business was pursued for the twenty-two months during which

the plaintiff was employed. During the early months of 1911 defendant Lossl, upon an examination of the accounts of the defendant corporations, discovered that, out of the whole number of checks received by the plaintiff, the latter had failed to account for several, the aggregate amount of which he did not then know exactly. The amount was then thought by him to be more than \$1,000. Thereupon, after consultation with the county attorney of Silver Bow county, he caused the arrest of the plaintiff on a charge of larceny as bailee of moneys belonging to the J. P. Lossl Company to the amount of \$1,000. The arrest was made on June 12, 1911, on a warrant issued upon a complaint filed with a justice of the peace. Plaintiff was held until he was admitted to bail. At a preliminary hearing thereafter had by the justice, the plaintiff was discharged.

At the trial plaintiff testified that during the time he was acting as agent for the defendant corporations, the defendant Lossl frequently had need of various sums in cash to be used by him personally, or in connection with the business of the corporation, that it was inconvenient for him to obtain cash from the bank, which was at Deer Lodge in Powell county, and that he would on such an occasion draw a check against the account of one or the other of the defendant corporations in favor of the railway or express company, and have plaintiff advance the amount of it in cash out of the funds in his hands belonging to the company to which it was made payable. These checks he said were not included in his monthly statements because they had no connection with the payment of freight and express charges, and hence were properly omitted. There were in all twenty-six of such checks not accounted for. The aggregate amount of them was \$2,000. Most of them had been drawn against the account of the J. P. Lossl Company. There was some testimony which corroborated these statements. The claim of Lossl was that all of the checks sent by him were intended to meet freight and express charges, that he never asked for nor received any accommodation from plaintiff in the way of cash advanced upon checks, and that plaintiff appropriated to his

own use the amount of the checks omitted from the statement, trusting that Lossl or the accountants of the corporations would not discover his thefts. The evidence introduced by the defendants tended to show that there was substantial foundation for this claim, but the jury refused to accept it.

1. We think the court erred in denying the motion of the Divide & Gibbonsville Stage Company. Though the defendant Lossl was its president and manager, it was not suggested by anything in the evidence that it had any connection with the prosecution of the plaintiff, or that Lossl instituted the prosecution in its behalf. It is settled law that an action for malicious prosecution will lie against a corporation as well as against a natural person. (*Weaver v. Montana C. Ry. Co.*, 20 Mont. 163, 50 Pac. 414; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Boogher v. Life Assn. of America*, 75 Mo. 319, 42 Am. Rep. 413; *Reed v. Home Savings Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Williams v. Planters' Ins. Co.*, 57 Miss. 759, 34 Am. Rep. 494; *Carter v. Howe Machine Co.*, 51 Md. 290, 34 Am. Rep. 311; *Goodspeed v. East Haddam Bank*, 22 Conn. *530, 58 Am. Dec. [2] 439.) By the great weight of authority it is also the rule that when an agent of a corporation in the course of the discharge of duties intrusted to him by it, and within the apparent scope of his authority, does an act from which a third person suffers injury, the corporation also is liable for the damages flowing therefrom, even though the agent may have failed in his duty to the principal, or may have disobeyed his instructions. (*Rand v. Butte Electric R. Co.*, 40 Mont. 398, 107 Pac. 87; *Golden v. Northern Pac. R. Co.*, 39 Mont. 435, 18 Ann. Cas. 886, 34 L. R. A. (n. s.) 1154, 104 Pac. 549; *Callahan v. Chicago etc. R. Co.*, 47 Mont. 401, 133 Pac. 687; *Weaver v. Montana C. Ry. Co.*, *supra*.) If the act is prompted by fraudulent or malicious motives, the fraud or malice of the agent is imputable to the corporation. (*Reed v. Home Savings Bank*, *supra*; *Vance v. Erie Ry. Co.*, 32 N. J. L. 334, 90 Am. Dec. 665; *Wheless v. Second Nat. Bank*, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783; *Carter v. Howe Machine Co.*, *supra*; *Williams v. Planters' Ins.*

Co., supra; Philadelphia W. & B. R. R. Co. v. Quigley, 21 How. (U. S.) 202, 16 L. Ed. 73.) The prosecution having been in-
[3] stituted by Lossl on behalf of the mercantile corporation—that is, to bring the plaintiff to justice for the alleged larceny of its funds—the presumption does not attach that he was acting for the stage company also, although he was its president, and although it appeared incidentally in the evidence that a few of the checks not accounted for were drawn upon its account. It was no more responsible for the prosecution than would have been any other corporation of which Lossl happened to be president and manager. The situation with reference to the other corporation is entirely different. Upon the face of the proceedings the presumption arises that Lossl was acting for it, for the subject of the larceny was its property, and as its president and manager, he was the proper person to institute the prosecution in its behalf.

The motion of Lossl was properly denied. At the close of plaintiff's case the evidence tended to support the claim of plaintiff that he had cashed the checks, not accounted for in his monthly settlements, solely for the accommodation of the defendant. If this was the fact—and for the purposes of the motion it was to be accepted as a fact—the prosecution was wholly without probable cause. This condition of the evidence warranted an inference of malice, for all the authorities agree that, while the
[4] plaintiff must prove both the want of probable cause and malice in order to make a *prima facie* case, they also agree that when the absence of the former has been established, the presence of the latter may be inferred. (*Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33.) It being the office of the jury to draw this inference under proper instructions, the motion was properly denied.

2. Counsel for defendants have devoted most of their printed argument to a discussion of the evidence, insisting earnestly that the explanation offered by the plaintiff as to why his monthly statements did not include the missing checks is so palpably improbable that it does not furnish any substantial support for

the verdict, especially so in face of the denial by defendant [5] Lossl that he ever obtained cash from the plaintiff for any purpose. Owing to the nature of the transactions between the plaintiff and the defendant, knowledge of them could not be had by others. Therefore, aside from the evidence showing that the prosecution had been terminated; that the defendant had consulted counsel before instituting it, and some circumstances corroborative of the conflicting stories told by the plaintiff and the defendant themselves—the jury were left to determine from these narratives alone where the right of the controversy lay. Of course, if the jury had accepted the story told by the defendant, the inevitable conclusion would have been that the plaintiff was guilty of the charge of larceny made against him, or, in any event, that the prosecution had not been instituted without probable cause. On the other hand, having accepted the story told by the plaintiff, with the legitimate inferences to be drawn from it, the jury were justified in concluding that the charge made was wholly without probable cause; and, having so concluded, they were at liberty to infer that in preferring the charge the defendant was prompted by malicious motives. And although in this character of action it is a complete defense that the defendant acted in good faith and upon the advice of counsel learned in the law, after fully and fairly laying the case before him, the court has no right and will not undertake to pass upon the credibility of the evidence with the inferences which the jury might be justified in drawing from it in this behalf. (*Martin v. Corscadden, supra; Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800; Newell on Malicious Prosecution, sec. 7.) In exercising the discretion lodged in it by law, the district court accepted the verdict of the jury and denied the motion for a new trial. It is not within our power to interfere, even though upon an analysis of the evidence we might entertain the view that the defendant ought to have prevailed.

3. Instructions numbered 2 and 3 submitted to the jury are the following:

“(2) If the jury believe from the evidence that the defendant [6, 7] caused the arrest and imprisonment of the plaintiff without probable cause and maliciously, as alleged in plaintiff’s complaint, then they will find for the plaintiff, and may assess his damages, if any were sustained, at such sum as they think proper, from the facts and circumstances in the case, not exceeding the sum of \$49,760.

“(3) The court instructs the jury that if you believe that the plaintiff was arrested and imprisoned by the defendant upon mere guess, or that the proceedings taken against him were commenced recklessly, and without exercising that care and caution necessary to justify a prudent man in commencing a criminal prosecution against another, then I instruct you that the arrest and imprisonment was without probable cause.”

Counsel insists that these instructions wrought prejudice to the defendants, because the issue being tried was whether the defendant had maliciously prosecuted the plaintiff, not whether he had maliciously caused plaintiff’s arrest and imprisonment, and that the court unduly emphasized mere incidents of the prosecution. The distinction between malicious prosecution and false imprisonment is this: If the arrest and imprisonment are brought about by legal process, but the prosecution has been instituted and carried on maliciously and without probable cause, it is malicious prosecution. If the arrest and imprisonment have been accomplished without legal process, it is false imprisonment. (*Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735; *Herzog v. Graham*, 9 Lea (Tenn.), 152; 26 Cyc. 8.) The latter is an unlawful violation of the personal liberty of another (Rev. Codes, sec. 8324), and is the subject of an action whether the wrongful act is prompted by malice or not. There is some diversity in the decisions on the subject, but the weight of authority seems to be in favor of the view that in an action for malicious prosecution it is not indispensable that the plaintiff show that he was arrested or imprisoned or was held to bail, and that it is sufficient to sustain the action if it appears that the plaintiff has maliciously and without probable cause been vexed and harassed

by a criminal prosecution. Whether the action will lie for the malicious prosecution of a groundless civil suit we need not now consider. The evidence shows that the plaintiff suffered both arrest and technical imprisonment. In drawing the attention of the jury to these facts the court seemed to indicate an opinion that proof of them was indispensable. This was error, but was error in favor of the defendants rather than against them, and therefore was not prejudicial because it cast a greater burden upon the plaintiff than he was required to sustain. Furthermore, in view of other portions of the charge, wherein the court defined clearly and correctly the rule of law applicable, we do not think the jury were misled.

In instruction No. 4 the jury were told that if they found for the plaintiff, they should award him damages in such an amount as would compensate him for the injury sustained, including loss of time, "his anxiety and suffering," etc. It is argued [8] that since the complaint does not allege specially damages accruing from mental suffering, the instruction permitted the jury to consider an element of damage which was wholly without the issues. It is not clear what the court meant by the expression "anxiety and suffering," but upon the assumption that it refers to mental suffering, the contention is without merit. In such an action the plaintiff is entitled to recover general compensatory damages for whatever injury he has suffered as the natural and necessary result of the charge made against him by the defendant. Bodily pain and suffering are the natural result of bodily harm, and compensation for them comes under the head of general damages. So mental anxiety and suffering flow naturally and directly from a groundless and malicious prosecution upon a charge of an infamous crime, the very foundation of which is the indignity inflicted by it; special allegations on the subject are therefore unnecessary. (*Shatto v. Crocker*, 87 Cal. 629, 25 Pac. 921; *Lytton v. Baird*, 95 Ind. 349; 13 Ency. Pl. & Pr. 452; 2 Sutherland on Damages, sec. 421.)

Counsel for the defendants requested the court to instruct the jury that the fact that the plaintiff had been discharged by

the justice of peace was not any evidence of a want of probable cause for the criminal prosecution, and could be considered by them only as evidence that the prosecution had terminated. The request was refused. Counsel insist that the refusal was prejudicial error, and cite *Martin v. Corscadden, supra*, as conclusive of their contention. The case is not in point. The court there held that the portion of the justice's docket containing a finding that the prosecution was groundless, and adjudging the costs against the prosecuting witness, was inadmissible because it was in effect a judgment upon the very question at issue, *viz.*, whether the prosecution was without probable cause and malicious. This is not a holding that the discharge by the justice was not any evidence of a want of probable cause. It [9] must appear by admissions in the pleadings or from the plaintiff's evidence, that the prosecution on account of which he is suing for damages is at an end, otherwise he has failed to make out a case for the jury. The complaint in this case alleges, and the answer admits, that the proceeding before the justice terminated by a discharge of the plaintiff. The necessity for the introduction of evidence on the subject was therefore dispensed with. The rule prevails in most jurisdictions that this fact, when shown, is *prima facie* evidence of a want of probable cause. (*Plassan v. Louisiana Lottery Co.*, 34 La. Ann. 246; *Straus v. Young*, 36 Md. 246; *Frost v. Holland*, 75 Me. 108; *Madison v. Pennsylvania Ry. Co.*, 147 Pa. 509, 30 Am. St. Rep. 756, 23 Atl. 764; *Jones v. Finch*, 84 Va. 204, 4 S. E. 342; *Vinal v. Core*, 18 W. Va. 1; *Bigelow v. Sickles*, 80 Wis. 98, 27 Am. St. Rep. 25, 49 N. W. 106; *Fox v. Smith*, 26 R. I. 1, 3 Ann. Cas. 110, 57 Atl. 932; *Sharpe v. Johnston*, 76 Mo. 660; *Chapman v. Dodd*, 10 Minn. 350 (Gil. 277); 26 Cyc. 38.) In *Davis v. McMillan*, 142 Mich. 391, 113 Am. St. Rep. 585, 7 Ann. Cas. 854, 3 L. R. A. (n. s.) 928, 105 N. W. 862, the supreme court of Michigan disapproves the doctrine of these cases, and declares it to be the better view that the fact of the discharge by the justice, standing alone, is no evidence of a want of probable cause. We shall not at this time enter into a discussion of the merits of these

[10] different views. We are of the opinion that where, as in this case, the order of discharge has been made after a full investigation of all the facts within the knowledge of the prosecuting witness, it is some evidence at least that the prosecution was groundless. From this point of view the requests of the defendants were properly refused.

The one remaining assignment made by counsel we do not think of sufficient merit to demand special notice.

As to the Divide & Gibbonsville Stage Company, the judgment and order are reversed, and the district court is directed to dismiss the action. As to the other defendants, the judgment and order are affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
DECEMBER TERM, 1913.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.
THE HON. SYDNEY SANNER, }

NORTHERN PACIFIC RY. CO., APPELLANT, *v.* MJELDE,
COUNTY TREASURER, RESPONDENT.

(No. 3,399.)

(Submitted November 17, 1913. Decided December 6, 1913.)

[137 Pac. 386.]

Taxation—Estates in Land—Deeds—Reservations—Mines—Mining Claims—Exemptions—Burden of Proof—Constitution—Construction.

Taxation—Estates in Land—Deeds—Reservation of Metals.

1. *Held*, that the estate remaining in the Northern Pacific Railway Company by reason of clauses inserted in deeds to portions of the lands granted to it by the government, which reserve "unto the grantor, its successors and assigns, forever, all mineral * * * including coal," as well as the use of the surface ground for exploration purposes, is an interest in real estate and therefore subject to taxation; *held*, further, that such interest does not constitute either a "mine" or a "mining claim" within the meaning of section 3, Article XII, of the state Constitution, proving, *inter alia*, that, independently of the surface ground, only the net proceeds of this species of property shall be taxable.

[As to the exemption from taxation of land owned by governmental bodies or in which they have an interest, see note in 132 Am. St. Rep. 291.]

Constitution—Nature of Instrument.

2. The state Constitution is a limitation upon legislative action, and not a grant of power.

Taxation—Revenue—Constitution—Construction.

3. Since the subject dealt with in section 3, Article XII of the Constitution, was revenue, any doubt as to the sense in which any term

therein found was used by the framers of that instrument must be resolved in favor of a definition under which public revenue will be raised, rather than one which will defeat such purpose.

Constitution—Legislative Construction—Effect.

4. A construction for many years placed upon a constitutional provision by the legislature in enacting statutes is entitled to respectful consideration by courts.

Same—Taxation—Mines and Mining Claims—Definition.

5. A "mining claim," as used in section 3, Article XII of the Constitution, relating to revenue, *held* to be a tract of land to which the right of possession or the title has been acquired pursuant to the Acts of Congress relating to the disposition of mineral lands, including coal lands; and a "mine," independently of the surface, *held* to be a developed mining property yielding, or in a condition capable of yielding, revenue.

Taxation—Estates in Land.

6. The separate estates which different persons may own in the same land—as where one owns the surface, another the growing timber, and a third the mineral underground—may each be subject to taxation.

Same—Exemptions—Burden of Proof.

7. Taxation being the rule and exemption the exception, the burden is upon him who claims that his property is exempt, to allege and prove facts bringing it within the favored class.

Same—Estates in Land—Cash Value—Difficulty in Ascertaining not Criterion.

8. Difficulty which may confront the assessor in ascertaining the full cash value of an interest in real estate reserved by the grantor in himself in a deed conveying the land may not be taken into account in determining whether such interest is subject to taxation.

Appeal from District Court, Park County; Albert P. Stark, Judge.

ACTION by the Northern Pacific Railway Company against Fred J. Mjelde, Treasurer of Park County. From a judgment for defendant, plaintiff appeals. Affirmed.

Messrs. Gunn & Rasch and Mr. O. M. Harvey, for Appellant, submitted a brief and one in reply to that of Respondent. Mr. M. S. Gunn argued the cause orally.

The question for decision is whether the coal, which is the property of the plaintiff by virtue of the exception or reservation contained in the deed, is subject to taxation. We maintain that this question should be answered in the negative, by reason of the provisions of section 3 of Article XII of the Constitution of Montana. In the lower court it was contended in support of the demurrer that the words, "All mines and

mining claims," in the above section of the Constitution, have reference only to land acquired from the United States pursuant to the Act of Congress relating to the disposition of mineral land, and the Act of Congress relating to the disposition of coal land, and that, as the title to the land in question was acquired from the United States by grant to the Northern Pacific Railroad Company, such land is not within the provisions of the section above. Is this contention correct? If not, it necessarily follows that the coal in the land which was reserved and remains the property of the plaintiff is not subject to taxation.

This court decided in the case of *Montana Coal & Coke Co. v. Livingston*, 21 Mont. 59, 52 Pac. 780, that the section of the Constitution referred to applies to the annual net proceeds of coal mines and mining claims acquired under the laws of the United States, relating to the acquisition of coal lands. Section 3 refers to "All mines and mineral claims * * * containing * * * coal or other valuable mineral deposits," etc. In view of this language, and of the decision of this court in the *Montana Coal & Coke Company Case*, it must be conceded that the reservation in question would not be taxable, provided the land had been acquired pursuant to the laws of the United States relating to acquisition of title to coal lands. According to the contention made in support of the demurrer, the asserted right to tax the reservation in question is founded on the fact that the land containing coal was not acquired from the United States pursuant to the Acts of Congress relating to coal lands and mineral lands, but by the grant to the Northern Pacific Railroad Company in the Act of Congress of July 2, 1864. If section 3 is subject to such a construction, then the section requires a classification to be made with reference to the law pursuant to which title is acquired from the United States and without regard to the nature of the property. Such a construction of the section renders it obnoxious to the provision of the Fourteenth Amendment to the Constitution of the United States, prohibiting any state from "denying to any person within its jurisdiction the equal protection of the laws." This

prohibition prevents the exemption of property from taxation, unless all of the class to which such property belongs is within the exemption. (*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255; 1 Cooley on Taxation, 3d ed., 72 *et seq.*; *Southern R. Co. v. Greene*, 216 U. S. 400, 17 Ann. Cas. 1247, 54 L. Ed. 536, 30 Sup. Ct. Rep. 287; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 431; *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554; *Essex County Park Commission v. Town of Orange*, 77 N. J. L. 575, 73 Atl. 511; *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717, 82 Pac. 833; *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973; *State v. Richards*, 52 N. J. L. 156, 18 Atl. 582.) Such a construction is also inconsistent with the requirement of uniformity in section 1 of Article XII of the Constitution. The only proper classification of property for taxation is one with reference to the nature of property and the uses to which it is applied.

As a United States patent has issued for the land in question, and there was excepted from the grant to the Northern Pacific Railroad Company all mineral lands, the land department, by the issuance of a patent, decided that the land does not contain mineral other than coal or iron. (*Barden v. Northern Pacific R. Co.*, 154 U. S. 288, 38 L. Ed. 992, 14 Sup. Ct. Rep. 1030.) The decision thus made must be taken as conclusive on the officers of the state exercising the taxing power, at least until minerals other than coal and iron have been developed and exposed in the land.

One of the rules for the construction of statutes and constitutions is that some meaning and significance must be given to every word used where it is possible to do so. (*State v. Cave*, 20 Mont. 468, 52 Pac. 200; *State v. Woodman*, 26 Mont. 348, 67 Pac. 1118.) The section of the Constitution under consideration refers to "All mines and mining claims." The word "mines" must be taken to mean something different from the words "mining claim" or otherwise there is no reason for its use. The word "mine" meant at the time of the adoption of the Con-

stitution, and now means, any land containing valuable mineral deposits whether located as a mining claim or not. It is synonymous with "mineral land." (*Davis v. Weibold*, 139 U. S. 507, 35 L. Ed. 238, 11 Sup. Ct. Rep. 628; *Dower v. Richards*, 151 U. S. 658, 38 L. Ed. 305, 14 Sup. Ct. Rep. 452, 17 Morr. Min. Rep. 704; *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 31 L. Ed. 182, 8 Sup. Ct. Rep. 131; *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, 64 Pac. 113; *Nephi Plaster & Mfg. Co. v. Juab County*, 33 Utah, 114, 14 L. R. A. (n. s.) 1043, 93 Pac. 53.) The legislative assembly has at all times used the word "mines" without reference to the law of the United States pursuant to which title to the land was acquired and as embracing any land containing mineral and that this is the sense in which the word is used in the Constitution. (See Rev. Codes, secs. 5246, 5248, 2500, 2501.)

Mr. D. M. Kelly, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, submitted a brief in support of the contentions of Respondent and one in reply to those of Appellant; *Mr. Poorman* argued the cause orally.

It is not contended by respondent that the state may assess coal or other mineral as such, "as it lies impacted between the stratas of stone, slate or clay in the state of nature"; for in its natural state, coal will pass with a conveyance of the land as a part of the real property. We maintain that by reason and virtue of the reservation, an actual freehold estate of inheritance in the land—in the real property itself—remains vested in the appellant, and that as such estate, it is subject to assessment and taxation. The sole question therefore is: Does the reservation contained in the deed of conveyance from appellant company to its grantees, create or reserve in the appellant "an estate in land," within the meaning of the assessment and taxation laws of this state? Under section 2501, Revised Codes, the interest so reserved by appellant must be classed as real estate. "The coal thus reserved by the grantor of the land is not personal property and cannot be until it is severed. By the conveyance of it

an interest in the land itself passed to the grantee, the ownership of portions of the constituents of the land, and falls within the designation of real estate." (*State v. Downman* (Tex. Civ. App.), 134 S. W. 787; see, also, *State v. Mayor*, 68 N. Y. 552; *Benavides v. Hunt*, 79 Tex. 383, 15 S. W. 396; *Gordon v. Million*, 248 Mo. 155, 154 S. W. 99; *Board of Commissioners v. Lattas Creek Coal Co.* (Ind.), 100 N. E. 561.) So long as the entire estate is vested in one person the total value is assessed to him, but when he has sold a part of it, as he has a right to do, why should he still be charged with the assessment of the whole, and that, too, although the mineral estate conveyed is or may be far the more valuable? A piece of land, plus the mineral estate, is certainly more valuable than the same piece of land minus the mineral estate.

As pointed out in the above cases, it is not necessary that coal be actually discovered in the land, for the estate thus created is an estate in the land itself. (*Consolidated Coal Co. v. Baker*, 135 Ill. 545, 12 L. R. A. 247, 26 N. E. 651.) The estate reserved in the plaintiff is unlimited in point of time, for it continues "forever." It is unlimited as to the character of mineral reserved, for it includes "all mineral of any nature whatsoever upon or in said land." It not only includes coal and iron but also gold, silver, copper, lead, tin, platinum, oil, gas, and even limestone. It is as much an estate in land as though the reserve was that of the sand, clay and gravel "upon or in said land."

The terms "mines" and "mining claims," as used in both the Constitution and the statute, are for all practical purposes synonymous in meaning; for "the word 'mine,' as used in mining law, may be used to designate 'the whole claim or body of the mining ground.' " (*Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72.) As distinguished from "mining claims" it is defined to be "a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging." (*Marvel v. Merrit*, 116 U. S. 11, 29 L. Ed. 550, 6 Sup. Ct. Rep. 207.) "Mining claim" is defined as: "The name given to a portion of

the public mineral lands which the miner for mining purposes takes up and holds in accordance with mining laws. It is not merely a vein or lode, but that with a certain quantity of surface ground.” (*Mount Diablo Mill. & Mining Co. v. Callison*, Fed. Cas. No. 9886, 5 Saw. 439, 9 Morr. Min. Rep. 616; *Salisbury v. Lane*, 7 Idaho, 370, 63 Pac. 383.) It is safe to assert that no case can be found defining the phrase “mining claim” that does not have direct reference to the mineral or coal land laws of the United States in the states where such mining laws operate.

The full power of the state to classify property within its boundaries, for the purposes of assessment and taxation, has been so thoroughly discussed by the supreme court of the United States that we here cite, without further discussion, those authorities: *Bell's Gap R. R. Co. v. Commonwealth of Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533; *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, 57 L. Ed. 1206, 33 Sup. Ct. Rep. 833. After all, the question of classification goes only to the amount of the assessment, and not to the right of assessment, and the amount of the assessment is not involved in this case. The proceeds of a mine may be assessed and taxed although title to the land still remains in the government and is not subject to taxation. Hence the assessment of “net proceeds” is not any assessment of the land or of any estate therein. (*Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313, 14 Morr. Min. Rep. 183.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Under the grant of July 2, 1864, section 23, township 3 south, range 8 east, and section 31, township 4 north, range 10 east, in Park county, were transferred by the government to the Northern Pacific Railroad Company. The Northern Pacific Railway Company succeeded to the ownership of these lands, and some time prior to the first Monday of March of this year it conveyed section 23 to Bernhard Blome, and section 31 to another purchaser. Each deed contained this provision: “Excepting and

[1] reserving unto the grantors its successors and assigns, forever, all mineral of any nature whatsoever upon or in said land including coal and iron, and also the use of such surface ground as may be necessary for exploring for and mining or otherwise extracting and carrying away the same." These reservations were listed for taxation, and, to forestall action by the county treasurer, the railway company commenced this suit to cancel the assessments and to restrain the collection of the tax. It is alleged that no exploration has been made upon section 23 for minerals or coal and it is unknown whether the land contains either. With reference to section 31, the complaint alleges: "That no coal, iron or other mineral has ever been extracted from said land, but as plaintiff is informed and believes and alleges said land contains coal." The trial court sustained a general demurrer to the complaint, and the railway company, electing to stand upon its pleading, suffered judgment to be entered against it and appealed.

We are called upon to determine whether that which the company reserved to itself in each of these parcels of land constitutes property which is subject to taxation under the Constitution and laws of this state.

That neither deed conveys the entire estate to the land described is apparent. That each carves out some interest which the grantor retains is not open to question, and that this interest is an estate in land must be conceded. The coal deposits which underlie section 31 form a part of the real estate within the definition given in section 2501, Revised Codes, and the reservation of those deposits, with the right to mine, constitutes an interest in real estate. While subsequent development may demonstrate that there are not any minerals or coal in section 23, still the right to explore for minerals, which includes the right to the possession of any portion, or all, of the surface if necessary, is an interest in the land as a whole. Section 2501, above, provides that "the term 'real estate' includes: The possession of, claim to, ownership of, or right to, the possession of land." And this would be the rule independently of statute.

“The word ‘property’ includes moneys, credits, bonds, stocks, franchises and all matters and things real, personal and mixed, capable of private ownership.” (Mont. Const., sec. 17, Art. XII; *Buck v. Walker*, 115 Minn. 239, Ann. Cas. 1912D, 882, and note, 132 N. W. 205; *Benavides v. Hunt*, 79 Tex. 383, 15 S. W. 396; *Gordon v. Million*, 248 Mo. 155, 154 S. W. 99; *Board of Commissioners v. Lattas Creek Coal Co.* (Ind.), 100 N. E. 561.) But the particular character of these property rights is not of consequence now. Each reservation is property, and all property in this state is subject to taxation, except such as is exempt. (Sec. 2498, Rev. Codes.) The only property specifically exempted is enumerated in section 2499, Revised Codes, as follows: “The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places of actual religious worship, hospitals, and places of burial not used or held for private or corporate profit, and institutions of purely public charity are exempt from taxation, but no more land than is necessary for such purpose is exempt.” Since these reserved rights do not fall within any of the classes of exempt property, they are subject to assessment for taxation, unless by some provision of the state Constitution they are relieved from the burden. The contention of appellant is that they are exempt by virtue of section 3, Article XII, which provides: “All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purpose, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to

mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law."

Our Constitution is not a grant of power, but a limitation—particularly a limitation upon legislative action. In [2] section 2 of Article XII the framers declared what property shall be, and what other property may be, exempted from the burden of taxation. Generally speaking, the public property of the United States and of the state and its subdivisions constitutes the first class, and the property of eleemosynary and educational institutions and places of burial not used for profit comprise the second. Having thus determined what property should or might be relieved from the necessity of contributing to the expense of government, the problem before the constitutional convention was, not how to exempt mining property from taxation, but rather how to compel it to respond to the reasonable demands of the state for revenue, and at the same time protect it against such exactions as would or might discourage prospecting or development. The debates of the convention, so far as they are available in their unpublished form, disclose this fact, and the history of our mining legislation furnishes added evidence of the correctness of this conclusion. The first revenue measure adopted in 1864 specifically exempted mining claims from taxation. (Bannack's Statutes, p. 411.) The next statute in terms exempted mines and mining claims. (Fifth Session, p. 41.) The succeeding Act exempted "mines and mining claims except those held under a patent from the United States." (Laws 7th Sess., p. 600.) By an Act approved February 21, 1879, the net proceeds of mines were made subject to taxation, and it was further provided: "That from and after the passage of this Act, no direct tax shall be levied upon any placer claim, quartz lead, or lode, except to the extent of the price paid for any mining claim in obtaining patent therefor from the government of the United States, and the only taxation of the proceeds thereof shall be that provided in this Act." (Laws 11th Sess.,

p. 65.) This was succeeded by the Act of March 10, 1887, which specifically exempted from taxation "mines, except on the net proceeds thereof, and mining claims, except those held under a patent from the United States, the surface of which shall be taxed as other real estate." (Comp. Stats. 1887, Fifth Div., p. 1108.) This was the status of mining property before the revenue law, at the time the constitutional convention met in 1889.

During the life of the territory, public property was always exempt; but in addition certain private property as well shared the privilege of being relieved from the burden of maintaining the government. Doubtless, as an aid to the encouragement of the mining industry, mines and mining claims were placed in the exempt class, except for the period from 1872 to 1879, during which time patented mining claims were subject to taxation as other property; but this was corrected by the Act of the Eleventh Session above, and, at the time section 3 of Article XII was under consideration, mines and mining claims, as such, were exempt from taxation. The net proceeds of mines were taxed as other taxable personal property, and the surface of a patented mining claim was subject to taxation as other taxable real estate. When, then, the framers of the Constitution removed this species of property from the exempt to the taxable class, they must be held to have acted deliberately with the purpose, as disclosed by their debates, of subjecting mines and mining claims to what in their judgment was the equitable proportion of the burden of governmental expense.

Instead of section 3, Article XII, being a provision exempting property from taxation, it is in fact a revenue measure. It fixes an arbitrary valuation upon the surface of patented mining claims, as such, and provides the method by which the value of a mine shall be determined, *viz.*, by the net value of its proceeds; but neither is relieved from producing its proportion of the revenue upon the basis thus established. While this provision does not exempt the nonproducing mine, by implication at least it determines that such a mine, independently of its surface, does not

have any value for the purpose of taxation, whatever value it may have as a speculative or commercial enterprise, and likewise that minerals, while in *a mine* or *mining claim*, have no taxable value.

Counsel for appellant apparently concede that most of what has been said is correct, but insist that since the surface of each of these parcels of land has been assessed to the purchaser, and since neither parcel has ever yielded any net proceeds from mining operations, there is not anything upon which to fix a valuation for the purpose of assessment, and consequently nothing to tax. The indispensable premise to this conclusion, however, is that the thing which is reserved in each instance is a mine or it is something without value. That definitions of the word "*mine*" sufficiently comprehensive to include the reservation in section 31, and possibly that in section 23, may be found, must be conceded at once. To indicate their scope, a few illustrations will suffice: A mine is: "An opening or excavation in the earth for the purpose of extracting minerals." (Anderson's Law Dictionary.) "An excavation in the earth for the purpose of obtaining minerals." (Bouvier's Law Dictionary.) "A pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging." (Black's Law Dictionary.) "An excavation in the earth from which some useful product is extracted. A deposit of useful material." (English's Law Dictionary.) "An opening in the earth made for the purpose of taking out minerals, and in case of coal mines, commonly a worked vein." (Kinney's Law Dictionary & Glossary.) "A work for the extraction of minerals by means of pits, shafts, levels, tunnels," etc. (Rapalje & Lawrence's Law Dictionary.) "An underground excavation made for the purpose of getting minerals." (Stroud's Judicial Dictionary.) "Quarries or places where anything is digged." (Jacob's Law Dictionary.) "An excavation properly underground for digging out some useful product as ore, metal or coal. Any deposit of such material suitable for excavation and working, as a placer mine." (Standard Dictionary.) "An excavation in the earth

made for the purpose of getting metals, ores or coal. When the term 'mine' is used it is generally understood that the excavation so named is in actual course of exploitation, otherwise some qualifying term is required." (Century Dictionary.) "The underground passage and workings by which the minerals are gotten, together with these minerals themselves." (Bainbridge on Mines, p. 2.) "A mine is not properly so called until it is opened; it is but a vein of coal before." (*Astry v. Ballard*, 2 Mod. 193, 8 Morr. 316.) "It may be conceded that the term 'mine' when applied to coal is generally equivalent to a worked vein, for by working the vein it becomes a mine." (*Westmoreland Coal Co.'s Appeal*, 85 Pa. 344.) "Coal Mine: A mine or pit from which coal is obtained." (7 Cyc. 266.) "The mode of obtaining the material and not the nature of the material itself is to be considered in order to come to a decision whether it constitutes a mine." (Denman, C. J., in *Rex v. Dunsford*, 2 Ad. & E. 568, 4 L. J. M. C. 59.) In speaking of the terms "known mine" as used in the pre-emption statute, the supreme court said: "It will thus be seen that, so far as the decisions of this court have heretofore gone, no lands have been held to be known mines unless at the time the rights of the purchaser accrued there was upon the ground an actual and opened mine which had been worked or was capable of being worked." (*Colorado Coal etc. Co. v. United States*, 123 U. S. 307, 31 L. Ed. 182, 8 Sup. Ct. Rep. 131.) In *Davis v. Weibbold*, 139 U. S. 507, 35 L. Ed. 238, 11 Sup. Ct. Rep. 628—a case involving the townsite of Butte—the court speaks of mines which lay buried, unknown in the depths of the earth. These definitions serve no other purpose than to disclose the wide range covered by lexicographers, courts and text-writers in their attempt to define what would appear at first blush to be a very simple term, and to confirm Mr. Ross Stewart, the learned Scotch law-writer, in his assertion that "the terms 'mine' and 'mineral' are not definite terms; they are susceptible of limitation according to the intention with which they are used; and in construing them, regard must be had not only to the deed or statute in which they

occur, but also to the relative position of the parties interested and the substance of the transaction or arrangement which the deed or statute embodies. Consequently, in themselves, these terms are incapable of a definition which would be universally applicable." (Stewart on Mines, p. 1.)

The determination of this controversy depends upon the meaning attached to the term "mine." Of necessity any definition adopted must be formulated more or less arbitrarily—grounded, as it will be, upon the intention of the framers of the Constitution as that intention is gathered from the Constitution itself and from contemporaneous history. Starting our investigation with the premise that in formulating section 3 the constitutional [3] convention had under consideration the subject "revenue," and was concerned with the question of producing sufficient funds to support the government, the elementary rules of construction, as well as the dictates of reason, require that, if there is a doubt as to the sense in which the term "mine" is used in that section, the doubt should be resolved in favor of a definition under which public revenue will be raised, rather than one which will defeat the obvious purpose of the convention. Conscious of the fact that the meaning of this term will be varied largely by the context or by the character of the instrument in which it is found, it devolves upon us to determine, if possible, the particular significance which the framers of the Constitution attached to the word "mine," independently of the surface ground, when they employed it in section 3 of Article XII. The idea of taxing the net proceeds of a mine was not new to them. For more than ten years the plan had prevailed in the revenue laws of the territory. Its operations had been tested, and its results were matters of history. There was not any room for doubt as to the meaning of the word "mine" in those statutes. They spoke from the standpoint of raising revenue. The Act of 1879 is entitled "An Act to provide for the taxation of the proceeds of mines," and section 1 provided that every person, corporation, or association engaged in mining upon any quartz vein or lode or placer mining claim should furnish to the assessor

annually a verified statement of the gross yield and necessary expenses of his or its mining operations, and that a tax should be levied upon the net proceeds. That legislative assembly in effect declared that the developed but dormant mine was without any value for the purpose of taxation, while the diminutive products of mining claims doubtless furnished sufficient excuse for the failure to mention them. The one predominant idea running through the legislation was that consideration was given only to the active, open and working mining property whose development had proceeded past that point which marks the boundary between a mining claim and a mine. To the members of the eleventh territorial legislative assembly the word "mine" meant a developed mining property, yielding or in a condition of development capable of yielding revenue upon the basis of the value of its gross output, less the necessary cost of mining operations and expense of reduction. The very subject matter under consideration, the plan adopted for carrying their ideas to practical results, the language employed to give expression to their views, and their knowledge of existing exemption statutes, preclude the possibility that any hidden, unknown or undeveloped deposit of ore or coal was ever contemplated as within the meaning of the term "mine."

When the framers of the Constitution formulated their ideas into Article XII, they caused all private property, except that enumerated in section 2, to be transferred from the exempt to the taxable class. In their zeal to compel every species of property to contribute to public expense, they included, as subject to taxation, the net returns from development or representation work on mining claims, however insignificant they might be. They also impliedly declared that a nonproducing mine has no taxable value, and there is not the slightest evidence that they used the term "mine" in any different sense from that employed in the Act of 1879. On the contrary, aside from the persuasive fact that they were dealing with the subject "revenue" and must have contemplated something in a condition which would or might produce revenue, we have the added force and effect of a

legislative construction of section 3, from the time of its adoption in 1889, to the present time.

There has been no period in the history of the state when the provisions of the Act of 1879, in every substantial particular, have not been in full force and effect. They were reproduced in the first revenue measure enacted after statehood (Laws 1891, p. 93, sec. 50 *et seq.*), carried into the Political Code of 1895 (secs. 3760–3768), and are now found as the existing law upon the subject, in sections 2563–2571, Revised Codes. The identity of expression, the harmony of plan, and the unity of purpose pervading these several measures, forbid the imposition of a different definition for the term “mine” in our state statutes, from that which was attached by the legislative assembly of 1879.

[4] For twenty-four years that definition has been accepted and acted upon by the legislative branch of our state government, and we thus have a construction of section 3—a construction manifestly in harmony with the views of the framers of that section themselves—but whether so or not, in the absence of anything to indicate a contrary purpose, that construction is entitled to most respectful consideration. (*State ex rel. Haire v. Rice*, 33 Mont. 365, 83 Pac. 874; *Johnson v. City of Great Falls*, 38 Mont. 369, 16 Ann. Cas. 974, 99 Pac. 1059.) It will not do for us to adopt a particular definition of the word “mine” merely because some other court has chosen the same definition. For example: In *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313, 14 Morr. Min. Rep. 183, the supreme court of the United States held that the term “mining claim,” as used in the Nevada statute, referred only to an unpatented claim held under the mineral laws; but such a definition never could have prevailed in Montana, for, from our first territorial legislation to the present time, a mining claim included one held under patent as well as one held merely by location before patent. The most elementary rules of construction require that we ascertain the intention of the framers of the Constitution and this we may do only so far as that intention is disclosed in the language employed when considered with the context, in the light of our history, the sur-

rounding circumstances, the subject matter under consideration, and the object sought to be attained.

While it is impossible for anyone to know with certainty what meaning the framers of our Constitution attached to the terms "mines" and "mining claims" in section 3, the application of those tests, denominated rules of construction, adopted and acted upon by courts throughout the civilized world, leads us to the [5] conclusion that a mining claim, as therein used, indicates a tract of land to which the right of possession or the title has been acquired pursuant to the Acts of the Congress relating to the disposition of mineral lands, including coal lands, and that a mine, independently of the surface, in the revenue sense as therein employed, is a mineral deposit, whether metallic or non-metallic, developed to the point of production and actually yielding, or capable of yielding, proceeds. The character of legislation, under which title or right of possession is acquired, is not a controlling factor at all. A mine upon a patented homestead is not less a mine because title from the government was acquired under laws providing for the disposition of agricultural lands only; and an undeveloped body of ore is not a mine though title to it was secured under the mineral laws, but it is merely a part of the real estate itself. In providing a fundamental law for the new state, the framers of our Constitution spoke in comprehensive terms; but we decline to believe that they used the word "mine" in section 3, in a sense which would include hidden, unknown or undeveloped deposits of ore or coal. In that section they spoke with reference to revenue and referred to something which would or might produce revenue in its present state of development. It was not necessary for them to consider rich deposits developed to the point of production but not operated. They were men of broad experience in this western country. They knew something of human nature, something of the prospector's daydreams of wealth, something of humanity's greed for gold. The avarice of man was doubtless deemed a sufficient dynamic force to subject all paying properties to constant employment, and justified their implied declaration that an

unworked mine is not of sufficient value to justify the expense of taxation. Our conclusion is that neither reservation involved in this controversy constitutes a mine within the meaning of that term as employed in section 3, Article XII, of the Constitution, but each is an interest in real estate. Land may be divided horizontally as well as vertically. That several estates in the same land may be owned by different parties is recognized generally. One may own the surface, another the growing timber, and a third the minerals underground, and each estate be subject to taxation. (*Smith v. Mayor*, 68 N. Y. 552.)

It will not do to say that, because neither of these reservations produces revenue, it is not of any value. From the very act of making the reservation, the presumption arises that each interest has some appreciable value, or the reservation would not have been made. Taxation is the rule, exemption is the exception; and, if either of these rights in fact is valueless, the burden is upon the party, claiming to come within the exception, to allege and prove the facts necessary to bring his property within the favored class. (*State v. Downman* (Tex. Civ. App.), 134 S. W. 787.)

The asserted right to tax these reservations rests entirely upon the fact that each constitutes an interest in real estate, and that neither is a mine or a mining claim within the meaning of section 3, Article XII, of our Constitution.

Section 1 of Article XII imposes upon the legislative assembly the duty to "prescribe such regulations as shall secure a just valuation for taxation of all property, except that specifically provided for in this article." But this is only one of several injunctions laid upon the lawmakers by the Constitution. Of course, the legislative assemblies should give heed to these commands, but if they fail there is not any remedy. They cannot be coerced except by public opinion. We doubt, however, that anything more was contemplated by this provision of the Constitution than has been provided by law. Section 2502 declares that "all taxable property must be assessed at its full cash value." The duties of the county assessor are prescribed. A

tribunal is created to review his acts, and every opportunity is afforded a dissatisfied taxpayer to present his grievances and have them determined or his assessment duly equalized. The [8] difficulty which may confront the assessor in determining the full cash value of a property interest of this character cannot operate as a factor in characterizing the interest itself.

In the absence of any allegation bringing either of these rights within the definition of a mine, or disclosing that they are, or either of them is, valueless, the complaint fails to state a cause of action. If this conclusion in its ultimate analysis involves a classification of property, which will result in denying to any person within this jurisdiction the equal protection of the laws—and we do not think that it does—the responsibility must rest upon the framers of our Constitution, who, in their zeal to promote the mining industry, arbitrarily gave to mines and mining claims a status before the law not enjoyed by other species of property.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

GILMORE ET AL., RESPONDENTS, v. OSTRONICH, APPELLANT.

(No. 3,306.)

(Submitted November 18, 1913. Decided December 9, 1913.)

[137 Pac. 378.]

Equity Cases—Appeal and Error—Transcript—Evidence—Rules of Court—Dismissal—Circumstantial Evidence—Sufficiency.

Appeal and Error—Equity Cases—Transcript—Evidence—Rules.

1. Disregard of subdivision 3 of supreme court Rule VIII, requiring that in equity cases where questions of fact are presented for review, the testimony relating thereto must appear in the transcript by question and answer, lays the appeal open to dismissal.

Circumstantial Evidence—Sufficiency.

2. Where, in a civil action, circumstantial evidence solely is relied on by plaintiff to prove an issue of fact, it is sufficient to sustain the ver-

dict or decision if it produces moral certainty in an unprejudiced mind as to the truth of his theory to the exclusion of any theory opposed thereto; the rule requiring proof beyond a reasonable doubt being applicable to criminal causes only.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Martin Gilmore and others against M. R. Ostronich. From a judgment for plaintiffs and an order denying him a new trial defendant appeals. Affirmed.

Mr. Chas. A. Wallace, for Appellant, submitted a brief and argued the cause orally.

Messrs. James E. Murray and *Joseph H. Griffin*, for Respondents, submitted a brief; *Mr. Murray* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiffs to obtain a decree dissolving a mining copartnership composed of the plaintiffs and the defendant, and to compel the defendant to account to the plaintiffs for the value of certain ore alleged to have been extracted by him from the common property and converted to his own use. The plaintiffs reside in Butte, Silver Bow county, and are the owners of the Nellie Bly quartz lode mining claim, situate in Madison county. On or about October 15, 1910, the defendant, having acquired from the plaintiff Wm. J. Jennings an option to purchase an undivided one-tenth interest in the claim, entered into an agreement with the plaintiffs to go to Madison county and take charge of the property, to extract ore therefrom, and to ship the same to a smelter for reduction, in the name of the Nellie Bly mine, the net proceeds to be paid by the smelter company to the plaintiffs. Out of the proceeds were to be paid to the defendant all the costs and charges for the work done by him, including his wages fixed at \$3.50 per day. Any balance remaining was then to be divided among the plaintiffs and the defendant, in shares proportionate to their respec-

tive interests, the defendant's share to be one-tenth. In the event the enterprise resulted in a loss, each of the parties was to contribute his proportionate share. It is alleged that while the defendant was engaged in working the claim he entered into a conspiracy with Thomas Lero, Robert Angelich and Spiro Vucinich to cheat and defraud the plaintiffs, by representing that certain of the ore shipped had not come from the common property, but from a pretended, fictitious location designated as the Grotto quartz lode claim; that thereafter the defendant caused to be shipped from the Nellie Bly claim to the Washoe Sampling Works at Butte, belonging to the Anaconda Copper Mining Company, but in the name of Robert Angelich, about sixteen tons of ore of the value of \$900 per ton, representing that the shipment had been made from the Grotto claim, whereas in truth the ore was from the Nellie Bly claim; that thereafter Angelich and Vucinich procured the proceeds of the ore, amounting to \$13,250.24, to be paid over to them; that Angelich, Vucinich, Lero and the defendant thereupon converted the money to their own use, and that the defendant failed to account to the plaintiffs for any portion of it. The answer denies all the allegations charging wrongdoing on the part of the defendant, and alleges that there is due him, for wages during the time he was at work, a balance of \$288.84. The court found that the defendant had converted to his own use ore to the amount and of the value alleged in the complaint, and rendered and caused a decree to be entered dissolving the copartnership, and requiring the defendant to account to the plaintiffs for the full amount thereof, less the sum of \$1,325.02, the one-tenth to which he is entitled under the agreement. The defendant has appealed from the decree and the order denying his motion for a new trial, and has submitted the question whether the evidence is sufficient to justify the findings.

The rule of this court relating to the form in which evidence [1] shall be presented on appeal requires "that in equity cases and in matters and proceedings of an equitable nature, wherein questions of fact arising upon the evidence presented in the

record are to be submitted for review by this court, the testimony relating to such questions shall be presented by question and answer." (Rule VII, subd. 3, 44 Mont. xxx, [123 Pac. xi].) In the preparation of his bill of exceptions, counsel for the defendant failed entirely to observe the requirement of this rule. The evidence is incorporated in the transcript in narrative form. The defendant is therefore not entitled to have the appeals determined on the merits. Nevertheless, upon the merits so far as we have been able to ascertain them from the record as presented, we think the decree and order should be affirmed.

The vital issue in the evidence is whether the ore in controversy was extracted from the common property, or was obtained from some other source. The evidence introduced by the plaintiffs is wholly circumstantial. Counsel for defendant, conceding that [2] the law makes no distinction as to the probative value between direct and circumstantial evidence, insists that when, as in this case, the plaintiff relies upon evidence of the latter kind alone, he must establish his claim beyond a reasonable doubt, by proof of circumstances consistent with each other and at the same time pointing so strongly to its validity as to exclude every other rational hypothesis, and that plaintiffs' evidence will not bear this test. The rule invoked by counsel is applicable to criminal cases, but has no application to civil cases. (1 Greenleaf on Evidence, 16th ed., 81d.) In the former the guilt of the defendant must be established beyond a reasonable doubt; in the latter the plaintiff will prevail if the preponderance of the evidence is in his favor. The solution of any issue in a civil case may rest entirely upon circumstantial evidence. (*Culbertson v. Hill*, 87 Mo. 553.) All that is required is that the evidence "produce moral certainty in an unprejudiced mind. (c. 7856.) In other words, when it furnishes support to the plaintiff's theory of the case, and thus tends to sustain her theory, it is sufficient to sustain a verdict or order." (*New Year Gold Mines Co.*, 31 Mont. 138,

77 Pac. 515; *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.)

We shall not undertake to analyze the evidence. As we view it, it furnishes ample support for the findings and decision of the district court, even under the rule invoked by counsel. Accordingly, the judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

BARNES, APPELLANT, v. SMITH ET AL., RESPONDENTS.

(No. 3,315.)

(Submitted November 20, 1913. Decided December 12, 1913.)

[137 Pac. 541.]

Corporations—Capital Stock—Ownership in One Person—Effect—Corporate Entity—Estoppel—Directors—Qualifications—Technicalities.

Corporations—How Dissolved.

1. After a corporation has been lawfully organized, it continues to exist until its life expires by limitation, or it has been dissolved by one of the modes prescribed by section 3905, Revised Codes.

Same—Capital Stock—Ownership in One Person—Effect.

2. Acquisition of all the capital stock of a corporation by one person does not vest him with legal title to the corporate property, but carries with it only an equitable interest in it.

Same.

3. Where one person acquires all the capital stock of a corporation and thereafter conducts the business in the corporate name, those who deal with the corporation may hold it liable for debts incurred in its name.

Same—Directors—Must be *Bona Fide* Stockholders.

4. By requiring directors of corporations having capital stock, to be stockholders (Rev. Codes, sec. 3833), the legislature intended that such officers should be *bona fide*, not ostensible, owners of stock.

Same—Ownership of Stock in One Person—Effect.

5. When the entire capital stock of a corporation passes into the hands of a single person, its corporate entity, except as to strangers who deal with it as a corporation through its officers and agents, is in abeyance and its functions for the time being cease.

Same—Estoppel.

6. One who, after acquiring all the capital stock of a corporation, makes use of the corporate machinery for his own purposes, even though acting in good faith, is estopped to deny its corporate capacity.

Same—Corporate Entity—Ownership of Stock in One Person—Effect—Case at Bar.

7. Plaintiff, owning all the capital stock of a corporation, induced two directors, who were in reality his agents conducting the business for his sole benefit, to indorse a note of the corporation as guarantors, the proceeds of which were used by it. He later sold the stock, agreeing to deliver to the purchaser the immediate possession of the corporate property, and to save the corporation harmless from any debts, liabilities, etc. Having paid the note, he brought suit against the defendants to recover on their contract of guaranty. *Held*, that a nonsuit asked for on the ground that the debt represented by the note was that of plaintiff individually was proper, since, under the circumstances, the corporation was merged in the plaintiff, and its obligations were his own.

Courts—Technicalities.

8. Courts in adjusting rights will look at the substance of the particular transaction, rather than its technical aspects.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

ACTION by John P. Barnes against D. F. Smith and another. From a judgment for defendants, plaintiff appeals. **Affirmed.**

Mr. Edward C. Russell, for Appellant, submitted a brief and argued the cause orally.

Argument—That appellant owned all the stock of the Judith Company, his ownership of the stock does not make him the owner of the assets of the corporation or make him individually liable for the debts of the corporation, in the event that the corporation was formed for the purpose on the part of the appellant. "The stockholders do not make contracts with third persons. Contracts between the corporation and third persons can be entered into by and not by the stockholders. Such is one of the characteristics of corporate existence. Although one person owns all the stock or all of it or all but two shares, he does not thereby acquire the right to act for the corporation independently of the directors. One person can own all the stock and yet the existence, relations and

business methods of the corporation continues.” (Cook on Corporations, 4th ed., sec. 709; *Humphreys v. McKissock*, 140 U. S. 304, 35 L. Ed. 473, 11 Sup. Ct. Rep. 779; *Newton Mfg. Co. v. White*, 42 Ga. 148; *Sharp v. Dawes*, 46 L. J. Q. B. 104; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667; *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, 5 Atl. 534; *England v. Dearborn*, 141 Mass. 590, 6 N. E. 837; *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373; *Farmers’ etc. Trust Co. v. Chicago etc. Ry.*, 39 Fed. 143; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 812.) There is no allegation or suggestion by the respondents of fraud on the part of the appellant, in acting through a corporation of which he owned all the stock; so that the law laid down in the above cases governs in this case, and the acts of Mr. Barnes as an individual and the acts of the company, through its board of directors, are entirely distinct and the acts of the latter do not bind the former and *vice versa*.

Appellant maintains that this is a contract of indemnity running to Borgeson, and that only he, or someone claiming under him, can enforce it. That it was so considered by the parties is evidenced by Borgeson’s assignment to Warr and McClave, and by the second part of the contract. It includes not only antecedent debts but also unliquidated and contingent liabilities. A contract of indemnity is for the benefit of the indemnitee only or those claiming under him. (22 Cyc. 101, note 28; *Moulton v. McLean*, 5 Colo. App. 454, 39 Pac. 78; *Price v. Rodman*, 2 Ky. Law Rep. 213; *French v. Vix*, 143 N. Y. 90, 37 N. E. 612; *Burke v. London Guaranty etc. Co.*, 47 Misc. Rep. 171, 93 N. Y. Supp. 652; *Kayser v. Silverberg*, 98 N. Y. Supp. 222; *Northam v. Casualty Co.*, 177 Fed. 981; *Atchison & C. Ry. Co. v. Lenz*, 35 Ill. App. 330; 22 Cyc. 85, note 29; Page on Contracts, sec. 1316.) It is unusual to find a decision at all-fours with a case at issue, but in the case of *German State Bank v. Northwestern Water & Light Co.*, 104 Iowa, 717, 74 N. W. 685, we find a case in which many of the facts so closely resemble those in this action as to make its reasoning and deductions peculiarly valuable. Moreover, the decision in this case is so broad and well

reasoned as to be quoted as a text-book statement: "Thus, persons injured cannot have an action on a promise by a vendor of stock to protect vendee against debts owed by the corporation to third parties." (Page on Contracts, sec. 1316.) This case has been cited and approved in *Chicago R. I. etc. Ry. Co. v. City of Ottumwa*, 112 Iowa, 300, 51 L. R. A. 763, 83 N. W. 1079; *Bird v. Jacobus*, 113 Iowa, 194, 84 N. W. 1063; see, also, *Union Nat. Bank v. Rich*, 106 Mich. 319, 64 N. W. 339; *Wolf v. American Tract Soc.*, 164 N. Y. 30, 51 L. R. A. 241, 58 N. E. 31; *French v. Vix*, 143 N. Y. 90, 37 N. E. 612; *Messenger v. Votaw*, 75 Iowa, 225, 39 N. W. 280; *Collins v. Kaw City Mill & E. Co.*, 26 Okl. 641, 110 Pac. 734; *Lorillard v. Clyde*, 122 N. Y. 498, 10 L. R. A. 113, 25 N. E. 917; *Peacock v. Williams*, 98 N. C. 324, 4 S. E. 550.

An agreement to pay an existing antecedent debt of another may make the promisor liable to the creditor as a principal. (*McCormick v. Johnson*, 31 Mont. 266, 78 Pac. 500, and cases cited.) As far as the rights of the creditor are concerned, it puts the promisor in the same position, as regards liability, as the indorser of the note; the payee or holder could sue them collectively or severally. (*Cole Mfg. Co. v. Morton*, 24 Mont. 58, 60 Pac. 587; *Brownlee v. Young*, 25 Mont. 38, 63 Pac. 798; *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 14 L. R. A. (n. s.) 842, 83 N. E. 392; *Farquhar v. Higham*, 16 N. D. 106, 112 N. W. 557.) But as between themselves, he is only liable secondarily as a surety, subsequent to the indorsers before delivery. As such he can proceed against prior indorsers. "A holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument has

" " " " of such former holder in respect to all parties prior
" (Rev. Codes, sec. 5906; *Craig v. Palo Alto Stock*
aho, 701, 102 Pac. 393.) A person who places his
a note prior to delivery is liable to all subsequent
ev. Codes, sec. 5912.) Payment of one secondarily
ot discharge the debt. (Ogden on Negotiable In-
ec. 148. Citing *Morgan v. Reintzel*, 7 Cranch

(U. S.), 273, 3 L. Ed. 340; *West Boston Sav. Bank v. Thompson*, 124 Mass. 506; *Callon v. Laurence*, 3 Maule & S. 95.)

Messrs. Belden & De Kalb, and *Messrs. H. G. & S. H. McIntire*, submitted a brief in behalf of Respondents; *Mr. S. H. McIntire* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by the plaintiff upon a promissory note for \$5,000, payable on demand and executed and delivered by the Judith Basin Milling Company (hereafter referred to as "the company") to the Empire Bank & Trust Company, of Lewistown, Montana, on March 6, 1911, and thereafter assigned to the plaintiff. Prior to the execution of the note to the bank, the defendants indorsed it as guarantors, waiving presentment, demand, protest and notice. The complaint is in the usual form, alleging demand upon the milling company and the defendants, and their failure to make payment. The defendants, admitting that they had indorsed the note and that they have not paid it, deny generally all the other allegations of the complaint. They then allege as a special defense substantially the following: That at the times mentioned in the complaint the plaintiff was the owner of the entire capital stock of the company; that on March 6, 1911, they were in charge of the business and affairs of the company, at the request and with the consent of the plaintiff, under an agreement to purchase from him the capital stock thereof; that it became necessary for the company to borrow the sum of money for which the note was executed; that they guaranteed the payment thereof as accommodation indorsers solely for the benefit of the company and at its request, receiving no consideration whatever therefor; that the sum received thereon was used by the company; that the agreement between the plaintiff and the defendants was not carried out, but that on August 26, 1911, the plaintiff sold the entire capital stock to one Charles Borgeson; and that as part of the agreement of sale to Borgeson, and

in consideration therefor in part, the plaintiff assumed and promised to pay the existing debts of the company, including the promissory note which is the subject of this action. The reply contains statutory denials of all these allegations, except that it admits, by not denying, that the plaintiff at the times mentioned was the owner of all the capital stock of the company. The trial was to the court without a jury. At the close of plaintiff's evidence the defendants moved the court to direct a nonsuit, for that no cause of action was disclosed by the evidence: (1) Because it appeared that the plaintiff was the owner of the entire capital stock of the company, and therefore that the debt represented by the note was his individual debt; and (2) because under his contract of sale to Borgeson he agreed to assume and did assume all the debts and liabilities of the company. The court reserved a decision of the motion. After the defendants had introduced their evidence, the court sustained the motion and directed judgment in their favor. Plaintiff has appealed.

The evidence discloses the following: The note was executed to the bank for money borrowed for the use of the company, and was used by it. At that time the defendants were ostensibly directors of the company, and the defendant McCullough was acting as its president. On August 26, 1911, the plaintiff sold the stock to Borgeson, the sale being witnessed by a writing which, after stating that the plaintiff is the owner of all the capital stock of the company and reciting the consideration paid by Borgeson, contains this stipulation: "Now, therefore, in consideration of the premises and of the purchase of said capital stock of the said party of the first part by said party of the second part upon said terms, the said party of the first part, for himself, his heirs, and administrators, does hereby agree to and with the said party of the second part that upon such sale he will turn over to said party of the second part all of the capital stock of the said Judith Basin Milling Company, free and clear of all encumbrances of every kind soever; that he will save the said Judith Basin Milling Company harmless from any debts, suits, judgments, liabilities, or obligations of any kind soever,

save as hereinafter specified, incurred by it or by the said party of the first part, prior to the transfer of said capital stock by the said party of the first part to said party of the second part, including taxes of every kind whatsoever for the year 1911, and said party of the second part shall have immediate possession of all premises." Other recitals in the agreement show that the saving clause in this stipulation has no reference to the note due the bank. On August 28 plaintiff paid the bank the amount of the note. It was thereupon indorsed to him without recourse. With reference to this transaction the plaintiff testified on his cross-examination, as follows: "Q. Mr. Barnes, you say you bought this note that has just been shown you? A. Yes, sir. Q. What was the purpose of your buying that note? A. Well, it was against the milling company, and when I sold the mill I promised Mr. Borgeson, the man I sold to, that I wouldn't allow any encumbrance to come against him or his interest, and I had a reason for buying the note otherwise. I thought probably it was due the bank. I was interested in the bank, and I paid them the money and took the note, with the risk of ever getting it out of Mr. Smith. I see he had indorsed the note as security on it, and he appeared to be pretty energetic, and I thought probably [I] might catch him some time and get the money out of him."

It does not appear that the plaintiff was at any time a director of the company, nor, if there were others besides the defendants, how many and who they were; but it does appear that at the time the debt to the bank was contracted the plaintiff was the owner of the entire capital stock of the company, and that at the time the sale was made to Borgeson he was in control of all of its property. It also appears by necessary inference that the defendants were not qualified to act as directors, even by nominal ownership of stock. It will be noted, further, that the plaintiff agreed to deliver to Borgeson the immediate possession of the property belonging to the company. It must therefore follow, as a necessary conclusion from the facts thus disclosed and the inferences justified by them, that the defendants, though acting as ostensible directors, were in fact mere

agents of the plaintiff, and were conducting the business of the company for his sole benefit. In brief, the business, whatever its extent, was being conducted in the name of the company, but was, in the ultimate analysis of the situation, the business of plaintiff.

What are the rights of the parties in the premises? Counsel for the plaintiff cites many authorities which announce the rule that the stockholders are not liable for the debts of the corporation and that the courts will not ignore its existence and entity, but will recognize and preserve it, even though the stock is all owned by one person. In most instances there is no doubt that this rule aids the purpose of the legislature in authorizing the creation of corporations, particularly industrial corporations, such as is the company here, *viz.*, to encourage trade and industry by enabling natural persons to make profitable investment by availing themselves of the skill, experience and personal fitness of others, without incurring personal liability for the obligations incurred in the management of the business of the corporation. So, after a corporation has been once lawfully [1] organized, it continues to exist until its life expires by limitation, or it has been dissolved by one of the modes prescribed by the statute. (Rev. Codes, secs. 3825, 3905; *Merges v. Altenbrand*, 45 Mont. 355, 123 Pac. 21; *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681.) Its character, as such, cannot be inquired into collaterally at the instance of a private citizen in a controversy between him and it. Its legal capacity can be brought in question by the state only through its proper officer (Rev. Codes, sec. 3892), and for one of the causes prescribed by the statute (*Id.*, sec. 6944). The rule is especially applicable to cases in which creditors are seeking to enforce their claims against the corporation, or to hold the directors liable for their failure to file their annual reports, or the like, when, though one director is the owner of all the capital stock, he has continued the business in the corporate name. The acquisition of all of [2] the capital stock does not vest the owner with title to the corporate property, so as to enable him to maintain an action

in replevin for it. (*Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667.) The ownership of the stock carries with it only an equitable interest in the property. (*Wilde v. Jenkins*, 4 Paige (N. Y.), 481.) Where one person, owning all [3] the stock, conducts the business in the corporate name, those who deal with the corporation can hold it liable for debts incurred in its name. (*Newton Mfg. Co. v. White*, 42 Ga. 148; *Louisville Banking Co. v. Eisenman*, 94 Ky. 83, 42 Am. St. Rep. 335, 19 L. R. A. 684, 21 S. W. 531, 1049.) In *Louisville Gas Co. v. Kaufman, Strauss & Co.*, 105 Ky. 131, 48 S. W. 434, the court of appeals of Kentucky held that, though one corporation held all the capital stock of another and was conducting the business of the latter through its own officers and directors, it was not liable for the negligence of the employees of the latter. The text-writers concur in holding that this is the general rule. (Cook on Corporations, 6th ed., sec. 663; Thompson on Corporations, 2d ed., sec. 6498.) Even so, there are exceptional cases in which the courts refuse to recognize the corporate entity, as distinguished from the stockholders, if the refusal of such recognition is necessary in order to get at the truth. This statement applies especially to cases in which the corporation is used as a cloak for fraud, or to enable the owner of the stock to evade personal liability or the performance of a public duty. It has application, also, to cases in which circuitry of action would otherwise be necessary to reach an adjustment of the rights of the parties. It was said by the court of appeals of New York, in *Seymour v. Spring F. C. Assn.*, 144 N. Y. 333, 26 L. R. A. 859, 39 N. E. 365: "The abstraction of corporate capacity will never be allowed to bar out and pervert the real and obvious truth." And again, in *Anthony v. American Glucose Co.*, 146 N. Y. 407, 41 N. E. 23: "We have of late refused to be always and utterly trammelled by the logic derived from corporate existence, where it only serves to hide or distort the truth." In this latter case the facts were that the Glucose Company had been formed for the purpose of taking over all the property and business of several other corporations, upon an agreement between the in-

corporators of all of them that payment for the transfer should be made by apportioning to the original stockholders the whole of the stock of the new corporation, except that reserved for use of the treasury. Stockholders of one of the constituent corporations, who had not received their stock, brought an action against the new corporation to compel its delivery to them. The court sustained the action. The extent to which the courts will ignore the corporate entity in order to do concrete justice, when the circumstances require it, is illustrated by the following cases: *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 48 L. R. A. 732, 56 N. E. 1033; *Andres v. Morgan*, 62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875; *Day v. Postal Tel. Co.*, 66 Md. 354, 7 Atl. 608; *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 579, 65 N. E. 470.

Under section 3833 of the Revised Codes, the powers of a corporation must be exercised by a board of not less than three nor more than thirteen directors, to be elected from among the stockholders, or, where there is no capital stock, then from the members of the corporation. "Directors of corporations for profit [4] must be holders of stock therein in an amount to be fixed by the by-laws," etc. (Sec. 3833.) Manifestly, the legislature, in making this requirement, intended that the directors should be *bona fide* owners of stock; otherwise, the aggregate body would be such only in name, and it would be possible for a single person, through his own employees and agents acting as his "dummies," to conduct his individual business under the guise of a corporation, with all of the attendant privileges and immunities, and thus escape personal liability altogether. The legislature did not intend this situation to be possible. The result of the requirement is that, when the capital stock passes [5] into the hands of a single person, the entity of the corporation, except so far as it is necessary to protect the rights of strangers, who deal with it through its ostensible officers and agents, is entirely in abeyance, and its functions for the time being cease. So it is held by the current of authority. (*First*

Nat. Bank of Gadsden v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904, 24 South. 351; *Louisville Banking Co. v. Eisenman*, *supra*; *Louisville Gas Co. v. Kaufman, Strauss & Co.*, *supra*; Thompson on Corporations, sec. 6498.) Strangers dealing with it while this condition exists cannot know of its internal affairs, [6, 7] and those who have made use of it for their own purposes, though they act in good faith, are estopped to deny its capacity or that they are its officers. (*Daily v. Marshall*, *supra*.) In controversies growing out of dealings of the ostensible officers with the sole owner of the stock, however, though he deals in the name of the corporation, we think the corporate entity should be ignored, and that the contract liabilities of the company to them should be treated as those of the owner of the stock.

If the bank were seeking recovery on the note which is the subject of this suit, we think it should be treated as a stranger to the corporation; but, so far as concerns the rights of the plaintiff and the defendants *inter sese*, the plaintiff should be deemed the corporation itself, and as occupying exactly the relation to the defendants as did the corporation when they indorsed the note. And this is but just, because the company could not have borrowed money without the plaintiff's consent, nor could the defendants have become parties to the contract, except as his agents. The district court was clearly right in looking at the [8] substance of the transaction, rather than its technical aspects, and adjudging the rights of the parties accordingly.

Counsel for the plaintiff has devoted considerable space in his brief to a discussion of the distinction between a contract of indemnity and one of suretyship and guaranty, and insists that, since the indemnity clause in the contract of sale runs to Borgeson only, only he or someone claiming under him can enforce it. The disposition we have already made of the case renders it unnecessary to consider the nature of this feature of the contract. Conceding it to be merely an agreement to indemnify Borgeson, it indemnifies him against a claim which the plaintiff cannot enforce against the company in any event,

because the payment to the bank was the discharge of an indebtedness which, so far as concerns the plaintiff, was his own.

The judgment is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

Rehearing denied January 7, 1914.

STATE EX REL. HILLIS, RESPONDENT, v. SULLIVAN, COUNTY
TREASURER, APPELLANT.

(No. 3,396.)

(Submitted November 19, 1913. Decided December 13, 1913.)

[137 Pac. 392.]

Constitution—Rules of Construction—Departments of Government—Powers—District Courts—Attendants—Appointment—Sheriffs—County Commissioners.

Constitution—Rules of Construction.

1. The state Constitution must be construed in the light of the history of the commonwealth, the surrounding circumstances, the subject matter under consideration, the object sought to be attained, as well as the system of laws in being at the time of its adoption and continued in force by Schedule 1 thereof.

Same—Nature of Document.

2. The state Constitution is not a grant, but a limitation, of power.

Same—District Courts—Attendants—Power to Appoint—Sheriffs—County Commissioners.

3. *Held*, that it is only after the sheriff has refused to perform the duties of court attendant, either in person or by deputy (Rev. Codes, sec. 3026), and the board of county commissioners has declined to furnish the district court with assistance sufficient for the transaction of business (sec. 6302), that a district judge may appoint his own attendant, fix his compensation and compel payment thereof out of the public funds.

Same—Departments of Government—Powers.

4. The provision of section 1, Article IV, state Constitution, dividing the state government into three departments, *held*, to mean that the powers properly belonging to one department shall not be exercised by either of the others, and not that there shall be an absolute independence between them.

Appeal from District Court, Lewis and Clark County; Roy E. Ayers, Judge of the Fourth Judicial District, presiding.

Proceedings in *mandamus* by the state, on relation of W. W. Hillis, against Stephen Sullivan, as treasurer of Lewis and Clark county. From a judgment directing the issuance of a peremptory writ and an order denying a new trial, defendant appeals. Reversed and remanded.

Mr. A. H. McConnell and *Mr. Joseph P. Donnelly*, submitted a brief in behalf of Appellant; *Mr. Donnelly* argued the cause orally.

Mr. Chas. H. Cooper, for Respondent, submitted a brief and argued the cause orally.

Citing the following authorities dealing with the extent and character of the powers granted to each of the several departments of government: *State ex rel. Sam Toi v. French*, 17 Mont. 54, 30 L. R. A. 415, 41 Pac. 1078; *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516; *Evers v. Hudson*, 36 Mont. 135, 92 Pac. 462; *State ex rel. Peyton v. Cunningham*, 39 Mont. 197, 18 Ann. Cas. 705, 103 Pac. 497; *State ex rel. Schneider v. Cunningham*, 39 Mont. 165, 101 Pac. 962; *Spratt v. Helena P. T. Co.*, 37 Mont. 60, 94 Pac. 631.

Under the Constitution the whole judicial power of the state is vested in the courts and officers named, and the other departments of government are prohibited from assuming to exercise any part of that power. (See Story on the Constitution, secs. 1591, 1592; *Chandler v. Nash*, 5 Mich. 409; *Van Slyke v. Trempealeau County etc. Ins. Co.*, 39 Wis. 390, 20 Am. Rep. 50; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *In re Weston*, 28 Mont. 207, 72 Pac. 512; *State ex rel. Schneider v. Cunningham*, *supra*; *Ex parte Towles*, 48 Tex. 413; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377; *Ex parte Reis*, 64 Cal. 243, 30 Pac. 806.)

The creation of a judicial tribunal by the Constitution vests it with plenary power to take any and all steps necessary to effectuate the purposes of its creation. (*Ex parte State*, 71 Ala. 371; *Nealis v. Dicks*, 72 Ind. 374; *White v. Hughes County*,

9 S. D. 12, 67 N. W. 855; *State ex rel. Boston & M. Co. v. Clancy*, 30 Mont. 193, 76 Pac. 10; *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143, 4 L. R. A. 101, 21 N. E. 244.)

The power to select their assistants and attendants rests solely in appellate and trial courts. (*State v. Noble, supra*; *People v. Hayne*, 83 Cal. 111, 17 Am. St. Rep. 217, 7 L. R. A. 348, 23 Pac. 1; *Ex parte City of Birmingham*, 134 Ala. 609, 59 L. R. A. 572, 33 South. 13; *State v. Davis*, 26 Nev. 373, 68 Pac. 689; *Dahnke v. People*, 168 Ill. 102, 39 L. R. A. 197, 48 N. E. 137; *In re Courtroom*, 148 Wis. 109, Ann. Cas. 1913B, 98, 134 N. W. 490; *Belvin v. Richmond*, 85 Va. 574, 1 L. R. A. 807, 8 S. E. 378; *In re Waugh*, 32 Wash. 50, 72 Pac. 710; *Watson v. Moniteau County*, 53 Mo. 133.)

“Whatever emanates from a judge as such, or proceeds from a court of justice, is judicial.” (*In re Cooper*, 22 N. Y. 67; *Striker v. Kelly*, 2 Denio (N. Y.), 323; *State v. Noble, supra*; *Board of Commrs. etc. v. Northern Pac. R. R. Co.*, 10 Mont. 420, 25 Pac 1058.)

MR. JUSTICE SANNER delivered the opinion of the court.

This cause was presented to the district court upon an agreed statement of facts, and judgment was entered directing that a peremptory writ of mandate issue to the appellant, as county treasurer of Lewis and Clark county, requiring him to pay to the respondent the sum of \$100 for services rendered as court attendant for the month of June, 1913. From that judgment and from an order denying him a new trial, the treasurer has appealed. The following are the material facts: The Honorable J. Miller Smith is, and since January 6, 1909, has been, one of the judges of the first judicial district of this state, presiding over department No. 2. On January 6, 1909, the respondent was appointed by Judge Smith as court attendant in said department No. 2, and ever since that time he has performed the duties required of him, devoting “all the working hours of every judicial day to the care and custody of the courtroom, the judge’s chambers, and all the books, papers and other property

connected with the said court and the judge thereof." He also acts as crier of said court, opening and adjourning court, and "when the court is engaged in the trial of cases, with a panel of jurors in attendance, takes care of jurors, under the usual oath, and performs all the duties required of bailiffs and court attendants" in the district court. For these services he was, up to and including the month of May, 1913, paid the sum of \$100 per month, but on May 1, 1913, he received a notice from the board of county commissioners of Lewis and Clark county to the effect that from and after June 1, 1913, bailiffs or court attendants would be allowed the sum of \$3 per day "for those days upon which the jury was in attendance at their respective courts." On June 30, 1913, he made out his receipt in the sum of \$100 for salary as court attendant for the month of June, 1913, and, after indorsement of approval by the county auditor, presented the same to the board of county commissioners; but the board declined to allow or authorize payment of such sum for the reason that under its above-mentioned order there was not due to the relator to exceed \$24 for the eight days of June upon which a jury was present in department No. 2. Thereupon the relator cast his demand into the form of a verified claim, in which he recited that his services had been rendered "at the special instance and request of the judge presiding," presented the same to Judge Smith who, on July 3, 1913, indorsed it as follows: "It is hereby certified that the foregoing claim and account is correct, and a proper charge against the county treasury of Lewis and Clark county, and must be paid out of the general fund thereof; and the treasurer of Lewis and Clark county is hereby authorized and directed to pay the same." A similar order was on the same day entered on the minutes of the court, preceded by the following recitals: "The board of county commissioners of Lewis and Clark county not having provided a court attendant for department No. 2 of this court, and a court attendant being necessary in said department of this court for the proper and expeditious transaction of the business of this court, and the judge of department No. 2 of this court having hereto-

fore requested and appointed W. W. Hillis to act as court attendant of department No. 2 of this court, and the said W. W. Hillis having presented his claim and account for services, * * * it is hereby certified," *etc.* Notwithstanding the above indorsement and order, the county treasurer refused and still refuses to pay the respondent's claim. In the agreed statement of facts there appears this further recital: "That immediately upon the qualification of the sheriff of Lewis and Clark county, Montana, he offered to perform the duties of court bailiff as required of him under the statute, and has ever since been willing, and is now willing, to perform such duties specified in the statute; but the court objected, as the relator herein had been and is now performing such services."

Briefly stated, the position of the appellant is that by the statute it is made the duty of the sheriff to attend upon the district court, act as crier thereof, call the parties, witnesses, and all other persons bound to appear, and make proclamation of the opening and adjournment of court, and of any other matter under its direction (Rev. Codes, secs. 3010, 3026); that by the statute the board of county commissioners is charged primarily with the care of the property and the disbursement of the funds of the county, and upon them, in the first instance, is imposed the duty of furnishing suitable rooms, attendants, *etc.*, for the district court (Rev. Codes, secs. 2894, 6302); that if the board shall fail to furnish suitable rooms, attendants, *etc.*, the court may direct the sheriff to procure them, and, when so procured, the expense thereof, certified by the judge, is a proper charge upon the county (Rev. Codes, sec. 6302); and that if the court has any power to appoint an attendant to perform the service required of the respondent, to fix his compensation, and make it a county charge payable without the assent of the board, such power can only be exercised upon and during necessity, and after the failure or refusal of the sheriff to perform such service, or that of the board to furnish the same.

On behalf of respondent we are favored with an elaborate and able brief, devoted to the demonstration of the following propo-

sitions: That by the Constitution of this state the powers of government are divided into three distinct departments: The legislative, the executive and the judicial; that no person or collection of persons charged with the exercise of powers properly belonging to one of these departments can lawfully exercise any powers properly belonging to either of the others, save as expressly authorized by the Constitution; that the whole judicial power of the state is vested by the Constitution in the judicial department, of which the district court is an integral part; that the district court is a court of record and, as the one court of general original jurisdiction in this state, is vested with all the powers necessarily incident to the full and free exercise of all its functions, save as limited by the Constitution; that included in these powers is the right to appoint its own attendants whenever necessary, and to itself determine the necessity in every case; that included in the right to appoint is the right and power to fix their compensation. As a conclusion from these postulates, it is contended that the district judge was authorized to appoint the respondent, to impose upon him the duties which he has performed, to fix his compensation, and to make it a liquidated charge upon the county, without regard to the neglect or default of either the board or the sheriff in the premises. We should be loath indeed to question any of the above propositions; but we think that, properly understood, they make for a conclusion quite different from that for which the respondent contends.

“It is an elementary rule,” said this court in *State ex rel. McGowan v. Sedgwick*, 46 Mont. 187, 127 Pac. 94, “that [1] Constitutions are to be construed in the light of previous history and the surrounding circumstances.” The framers of our Constitution spoke in general terms, and their intention is to be ascertained not merely from the language used, but “in the light of our history, the surrounding circumstances, the subject matter under consideration, and the object sought to be attained.” (*Northern Pac. Ry. Co. v. Mjelde*, ante, p. 287, 137 Pac. 386.) Our Constitution uses many terms that it does not

define, provides for many offices the duties of which it does not prescribe. "In judging what it means, we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." (Cooley's Const. Limitations, 7th ed., p. 94; Constitution of Montana, Schedule 1; *Wastl v. Montana Union Ry. Co.*, 24 Mont. 159, 61 Pac. 9.)

When the Constitution was adopted, "the previous history" of this community, "the well-understood system" then in use, included a political organization of more than twenty years' standing, which was republican in form, constitutional in character, and broadly resembled in all but complete autonomy the scheme of government with which we are familiar. Then, as now, the common law was "the law and rule of decision," save as affected by legislation. There was also an extensive body of statute law, all of which was continued in force except where inconsistent with the Constitution. (Schedule, sec. 1.) And there were such instrumentalities of government as district courts, sheriffs and county commissioners. These instrumentalities were continued by the Constitution—the district court with an expression of its general jurisdiction only, the sheriff and county commissioners without any definition whatever. The [2] Constitution is not a grant, but a limitation, of power (*Northern Pac. Ry. Co. v. Mjelde, supra; In re Beck's Estate*, 44 Mont. 561, 121 Pac. 784, 1057), and it is manifest from its text that as to all unexpressed duties and powers—whether of the district court, the sheriff, or the county commissioners—the convention that framed and the people who adopted it had in view these offices, as they were commonly known, as possessing the attributes and authority which had theretofore been declared by the written and the unwritten law, and which "were shadowed forth and symbolized by their names." (*French v. State*, 52 Miss. 759; *King v. Hunter*, 65 N. C. 603, 609, 6 Am. Rep. 754;

Warner v. People, 2 Denio (N. Y.), 272, 43 Am. Dec. 740; *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84.)

Under the Organic Act, the district court was a tribunal of grave dignity; in it and the supreme court of the territory were vested all the jurisdiction formerly possessed by the superior common-law courts of England (*Territory v. Flowers*, 2 Mont. 531), together with that of chancery (*Zimmerman v. Zimmerman*, 7 Mont. 114, 14 Pac. 665); and doubtless it was clothed with all the power and authority necessary to render its jurisdiction effective. It is by no means clear, however, that the superior common-law courts of England were wont to assert or claim the right *in limine* to select, and fix the compensation of their own attendants, without reference to other agencies of government. Certainly this was not the case when the judges of these courts were holding the assizes, for we read that of old it was incumbent upon the sheriff "to meet the judges on their progress through their circuits, usually upon the borders of the county, escort them to the assize town with much display and antique ceremonial, procure for them suitable quarters, attend them with his undersheriff and a sufficient corps of deputies and bailiffs during their settings, and at the close of the term speed the parting guests with the like demonstrations of respect with which they were welcomed." (Murfree on Sheriffs, sec. 425.) This, doubtless with some abatement of the fanfare, it is still his duty in England to do (25 Halsbury Laws of England, p. 805, sec. 1391); but these attendants were always servants of the sheriff, and for their conduct and compensation he was answerable. (1 Blackstone, pp. 339, 347.) In general, the common-law relations of the courts to the sheriff have been preserved in the United States. In the absence of statute to the contrary, the office of sheriff imports, and always has imported, that he is the executive arm of the district court, that it is both his duty and his privilege to attend upon its sessions, either in person or by deputy, to act as the crier of the court, to execute the lawful orders of the court, and to furnish the court, when no other provision has been made, such apartments, appliances and

attendants as the court may require for the transaction of its business. (Murfree on Sheriffs, Chap. 10; *In re Court Officers*, 3 Pa. Dist. R. 196; *Mercer County Commrs. v. Patterson*, 2 Rawle (Pa.), 106.)

An examination of the various statutes of the territory which are pertinent to this controversy unmistakably evinces that such was the relation of the district court to the sheriff for the entire period from the Organic Act to the Constitution. "The sheriff, in person or by his undersheriff or deputy, shall • • • attend upon the several courts of record in his county." (Bannack Statutes, p. 511, sec. 7; Codified Statutes 1872, p. 445, sec. 58; Rev. Stats. 1879, p. 492, sec. 404; Comp. Stats. 1887, Gen. Laws, sec. 855.) "If a room for holding the court be not provided by the county, together with attendants, etc., suitable and sufficient for the transaction of business, the court may direct the sheriff to provide such room, attendants, etc., and the expense shall be a county charge." (Bannack Statutes, p. 137, sec. 476; Codified Statutes 1872, p. 161, sec. 623; Rev. Stats. 1879, p. 168, sec. 683; Comp. Stats. 1887, p. 243, sec. 703.)

So, too, the functions of the county commissioners were well known when our Constitution was adopted. Then and during the whole territorial *regime* the county commissioners were three in number in each county; they constituted a board; as a board they represented the county, were the custodians of its property, and the managers of its business and concerns; they were charged with the exercise of its powers, including the making of contracts and the incurring of expense. It was their special duty to examine, settle and allow all accounts chargeable against the county, and they were the only agency through which the county could perform the duties imposed upon it. (Bannack Statutes, pp. 499-501; Codified Statutes 1872, pp. 434, 435; Rev. Stats. 1879, pp. 479-481; Comp. Stats. 1887, pp. 842-844.)

With these relations, then, the district courts, the sheriffs, and the county commissioners passed from territorial to constitutional agencies of government; the district courts having no more power to secure attendants than they had to secure rooms.

Could the district judge have hired a courtroom at the expense of the county without regard to whether suitable provision had [3] already been made? The Code provisions now in force and relied on by appellant (secs. 2894, 3010, 3026, 6302, Rev. Codes) merely declare relations which have always existed. These statutes cannot be effectively assailed as invasions of the inherent power of the court, because the power of the court, as organized by the Constitution, did not include the right to appoint attendants without prior recourse to the sheriff and to the county. The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods. When we say that it is primarily the duty and right of the sheriff, either in person or by deputy, to perform all the duties for which an attendant upon the district court may be had at public expense, that if additional attendants are required the county through its board of commissioners shall furnish them, that if the county fail in that regard the court may procure them through the sheriff, we express the normal situation, the orderly method which must be observed so long as it is adequate in results. When, however, these methods fail and the court shall determine that by observing them the assistance necessary for the due and effective exercise of its own functions cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not till then does occasion arise for the exercise of the inherent power. (*Los Angeles v. Superior Court*, 93 Cal. 380, 28 Pac. 1062; *County of San Joaquin v. Budd*, 96 Cal. 47, 30 Pac. 967.)

Neither, in our opinion, is it necessary for the preservation of judicial independence that the district court should have the power to appoint its own attendants, fix their compensation, and compel payment out of the public funds, without recourse to the sheriff, who is paid for that service, or to the county commissioners, who are charged with the supervision of county expenditures. The court is entitled to trustworthy and competent attendants as needed; it is not obliged to accept any other; it may procure such service if the sheriff does not, or the board

will not, supply it. How, then, can its independence be endangered when the remedy is in its own hands? The most important of all its ministerial officers is the clerk, with whose selection it has nothing to do; if a vacancy occurs in that office it is filled by appointment, not of the judge, but of the county [4] commissioners. The separation of the government into three great departments does not mean that there shall be "no common link of connection or dependence, the one upon the other in the slightest degree" (1 Story's Commentaries on the Constitution, sec. 525); it means that the powers properly belonging to one department shall not be exercised by either of the others (Constitution, Art. IV, sec. 1). There is no such thing as absolute independence. The governor may recommend or veto legislation, and he may fill vacancies occurring on the bench of this court or of the district court. The legislature may increase the number of judges in any district, it may prescribe, as it has prescribed, the entire scheme of pleading and practice by which rights are asserted and wrongs redressed in the courts, and it may impose additional duties upon certain executive officers. The judiciary may set aside Acts of the legislature that are clearly unconstitutional, and it may coerce the executive into the performance of ministerial duties. The protection of the judicial department from encroachment is not to be sought in extravagant pretensions to power, but rather in a firm maintenance of its own clear authority coupled with "a frank and cheerful concession of the rights of the co-ordinate departments." (*People ex rel. Smith v. Judge*, 17 Cal. 548.)

But it is insisted that under the decision of this court in *State ex rel. Schneider v. Cunningham*, 39 Mont. 165, 101 Pac. 962, this appeal must be determined in favor of the respondent. Mr. Schneider was the appointee of this court to an office, that of stenographer, which had not been formally created by legislative Act but had arisen out of the necessities of this court; the legislature had from session to session, however, made appropriations to pay for the services rendered therein; the question presented was whether, after the legislature had made an appropriation

of \$200 per month in that behalf, the state board of examiners were vested with the authority to say that the appointee of this court was not entitled to the compensation thus provided. The right claimed by the board of examiners was absolute and unconditional; but we held that the power vested by the Constitution in that board "to examine all claims against the state, except salaries or compensation of officers fixed by law," did not authorize it to deny to the stenographer of this court the compensation for which the legislature had provided; nor was it authorized by section 262, Revised Codes, to grant this court permission to employ a stenographer, since that implied the right to withhold such permission and thus disable the court or seriously hamper it in the discharge of its duties. We said: "The legislature, recognizing the fact that the court has the power by which it may supply its own necessities, enacted section 6248 of the Revised Codes. * * * In case no provision had been made for a stenographer, there would have been furnished by this section a mode by which one could have been secured, as well as the power to fix and order his compensation paid. This provision indicates recognition on the part of the legislature of the necessity that this court should be free from any control in the selection of its assistants in case the legislature should itself have failed to make suitable provision for them." There is nothing in the *Schneider Case* to conclude us upon any of the questions now presented, for the power of the district court to appoint its own assistants in any event is not assailed. It is the exercise of that power without the necessity therefor appearing. The relator at bar was appointed by the district court to render a service which by statute and by the common law it was the right and duty of the sheriff to render, or of the county to supply. He was appointed *ex gratia*, without recourse to the mode prescribed by law and without anything to indicate that such recourse would be unavailing. He has been kept, not out of the necessities of the court, so far as the record discloses, but in spite of the sheriff's offer to render all the attendance for which public moneys may be paid. His compensation has been

fixed by the district judge without reference to legislation, and has been ordered paid out of funds for the expenditure of which the board of county commissioners is primarily responsible. To state the instant case is to state its necessary conclusion, *viz.*, that the service of the respondent covered by his claim was without authoritative warrant. Therefore, his claim, though audited by the judge, is not a liquidated charge against the county, and therefore the appellant cannot be compelled to pay it.

The judgment below is reversed and the cause remanded, with directions to dismiss the proceeding.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

SMITH, RESPONDENT, v. ZIMMER, APPELLANT.

(No. 3,318.)

(Submitted November 21, 1913. Decided December 16, 1913.)

[137 Pac. 538.]

Personal Injuries—Defective Highways—Road Supervisors—Liability for Neglect of Duty—Instructions—Cross-examination.

Highways—Defects in—Road Supervisors—Duty to Warn—Liability for Injuries.

1. Where a road supervisor, though promptly advised of a washout in his district, omitted for a period of about five months to provide a barrier or give warning of any kind, as a result of which plaintiff, unaware of the defect and unable to see it while driving along the road at night, was injured, the former was *prima facie* liable to the latter in damages.

Same—Proper Cross-examination.

2. A party may not complain of questions on cross-examination, the door to which he himself opened by his direct examination of the witness.

Same—Duty of Road Supervisors—Instructions—Proper Refusal.

3. It being the duty of road supervisors, in the absence of funds to repair a defect in a public road, to give suitable warning, or, if necessary, to barricade the defective portion, an instruction which would have told the jury that such an officer was not liable for personal injuries occasioned by a washout if funds were not available for repair work was properly refused.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

ACTION by G. W. Smith against Henry Zimmer. Judgment for plaintiff, and defendant appeals from it and an order denying his motion for new trial. Affirmed.

Messrs. A. P. Heywood and Homer G. Murphy, for Appellant, submitted a brief; *Mr. Murphy* argued the cause orally.

It has been universally held by the courts of every jurisdiction that a lack of funds, or means of procuring them, with which to perform a duty enjoined by law is an absolute defense to an action against a public officer for the nonperformance of such duty; that having such funds or a means to procure them is always a condition precedent to any liability for failure to perform such duty. (Mechem on Public Officers, sec. 701; Elliott on Roads and Streets, 2d ed., sec. 863; *Batdorff v. Oregon City*, 53 Or. 402, 18 Ann. Cas. 287, 100 Pac. 937, 940; *Hines v. City of Lockport*, 50 N. Y. 236; *Clapper v. Town of Waterford*, 131 N. Y. 382, 30 N. E. 240; *Merritt v. McNally*, 14 Mont. 228, 241, 36 Pac. 44; *Taylor v. Manson*, 9 Cal. App. 382, 99 Pac. 410; *Garlinghouse v. Jacobs*, 29 N. Y. 297, 303; see, also, *Smith v. Zimmer*, 45 Mont. 282, 125 Pac. 420.)

But it was contended in the court below that inasmuch as appellant did have funds in his hands at a time subsequent to the date of the washout at the point where the accident occurred, but used such funds elsewhere in his district, he is liable in this action. However, without regard to these considerations the authorities with practical unanimity hold that where funds on hand are insufficient to make all the repairs, a road supervisor is not liable for an error in judgment in expending them in one place when another as a fact stood in greater need. (See *Garlinghouse v. Jacobs*; *Taylor v. Manson*, *supra*.)

It was also contended by respondent in the lower court that section 1372 of the Revised Codes imposed a duty upon the road supervisor to remove any obstruction and repair any damage

to the roads in his district, without regard to the other provisions of the statute relating to available funds or directions from the board of county commissioners. But this contention is untenable for the reason that these various sections of the Codes, relating to the duties of road supervisors, were all passed at the same time and are parts of an Act to establish a uniform law governing highways in this state; consequently they must, under familiar principles, be read and construed together. (See *People ex rel. Everett v. Ulster County Board of Supervisors*, 93 N. Y. 397; *Clapper v. Town of Waterford*, *supra*.) While section 1372 does permit a road supervisor to call out certain persons within his district in cases of emergency, it is evident that this can only be done under the limitations laid upon such supervisors by sections 1360–1364; that is to say, when he has funds of the county available to him out of which such persons can be compensated. (See *Walnut Township v. Heth*, 9 Kan. App. 498, 59 Pac. 289.) If the people ordered out by a road supervisor, in pursuance of this section, refuse to respond, the most that the supervisor could do would be to have them prosecuted for such refusal. A supervisor could not contract for such work as may be necessary to repair such a defect, nor could he incur any expense in making such repairs, or earn any compensation for his labors incident thereto, if, in so doing, he exceeded the apportionment provided for, or the limitations imposed upon him, by sections 1364 to 1369.

In view of the statute, *supra*, if the appellant had proceeded with repairs on the highways in his district and disbursed moneys, or incurred an indebtedness, or earned an amount as his own compensation, he could not have recovered from the county any part of the same that exceeded the apportionment to his district, or that was in violation of the order of the board of county commissioners received by appellant under date of March 13, 1909. His work and disbursements would have been those of a volunteer (*Flynn v. Hurd*, 118 N. Y. 19, 22 N. E. 1109); and as to voluntary payments see the recent case of *Penwell v. Flickinger*, 46 Mont. 526, 129 Pac. 323.

Messrs. Walsh, Nolan & Scallon, for Respondent, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The respondent, plaintiff below, while driving, on the night of October 11, 1909, upon what is known as the Elk creek road—a public highway in road district No. 1, Lewis and Clark county—was precipitated into an unguarded washout, and sustained personal injuries. To recover damages for such injuries, he brought this action against the appellant, who was supervisor of district No. 1, and also against the persons who were at that time county commissioners of Lewis and Clark county, grounding his action upon negligent failure to repair and negligent failure to warn the public of the danger. In consequence of the decision of this court upon a former review of this case (*Smith v. Zimmer*, 45 Mont. 282, 125 Pac. 420), the county commissioners ceased to be defendants, and the action proceeded against the supervisor alone. The trial was to the court, with a jury, who, by their verdict, awarded the respondent damages in the sum of \$2,000. Judgment upon the verdict was duly entered, and, from that judgment, as well as from an order denying appellant's motion for new trial, these appeals are prosecuted.

So far as the liability of appellant is concerned, the facts disclosed by the present record do not substantially differ from those stated in the former decision by this court. Further reference to them, therefore, need not be made, save to add that the [1] evidence shows the washout to have occurred early in June, 1909; that appellant was promptly advised of it; that he provided no barrier or warning of any kind; that the respondent did not know of the washout; and that he could not see it at the time he was injured. In the former decision we said: "Under the facts appearing in the evidence, a *prima facie* case of liability is made against the defendant Zimmer for failure to make the repairs by removing the obstruction, or, in case he could not do so, for failure to warn the public of the existing condition.

* * * At the trial * * * the defendants may be able to

show that the conditions were such that, with the means at their disposal, they were unable to make the necessary repairs; * * * but even this would not excuse the omission to take suitable measures to give notice of the obstruction or to provide suitable barriers to prevent a traveler from being injured by it, if the facts show that such was the case."

Sixteen errors are assigned presenting these questions, which we answer in their order:

1. Whether two certain questions in the cross-examination of the witness Doty were properly permitted. We think they were [2] properly permitted, because the door was opened for them in the direct testimony of this witness.

2. Whether certain instructions proposed by appellant should have been given. We think not. These instructions proceed [3] on the theory that exoneration of the appellant would follow if his failure to repair was due to lack of funds; they ignore the fact that, under the former decision of this case, it was the appellant's duty, regardless of funds, to suitably warn the public, and, if necessary in the exercise of due care, to barricade the washout.

3. Whether certain instructions, given at the instance of respondent, were justified. We think they were justified by the former decision of this case. All of them may not have been necessary; but objection was not made upon the ground of repetition.

4. Whether the appellant's motion to direct a verdict, and his later motion for a new trial, should have been sustained. We are not favored with any argument directed specifically to the denial of these motions; but the testimony presented a case for the jury, under the former decision of this court. The record does not disclose that any imperative reason was presented to the district court for granting a new trial.

The judgment and order overruling the motion for new trial are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

GOLDSMITH, EXECUTOR, APPELLANT, v. MURRAY, RESPONDENT.

(No. 3,317.)

(Submitted November 21, 1913. Decided December 16, 1913.)

[138 Pac. 187.]

Partnership—Actions—Theory of Case—Conclusiveness on Appeal.

Partnership—Actions at Law Between Members—When not Maintainable.

1. One partner cannot, prior to a settlement and accounting, sue his copartner at law with reference to partnership transactions.

Same—Appeal—Theory of Case—Conclusiveness.

2. Under the rule that a party will be held bound on appeal by the position assumed by him in the trial of his case in the district court, where an action concerning dealings between former partners, brought after settlement of the partnership affairs, was tried as one at law, with the apparent consent of appellant, he was not in a position to assert that it should be reviewed as a suit in equity for an accounting.

Appeal—Conflicting Evidence—Judgment—Affirmance.

3. In an action at law tried by the court without a jury, the evidence introduced in which was conflicting, it was the exclusive privilege of the trial judge to determine the credibility of the witnesses, and its finding, reviewed on motion for new trial and attacked for insufficiency of the evidence to support it, must be accepted as final on appeal.

'Appeal from District Court, Silver Bow County; W. R. C. Stewart, Judge of the Ninth Judicial District, presiding.

ACTION by A. W. Goldsmith, as executor of the last will and testament of Henry L. Frank, deceased, against James A. Murray. Judgment for defendant. From an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Mr. Chas. R. Leonard, and Mr. Frank C. Walker, for Appellant, submitted a brief and one in reply to that of Respondent; Mr. Walker argued the cause orally.

Mr. James E. Murray, for Respondent, submitted a brief, and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by H. L. Frank to recover a balance alleged to be due him on account of money paid out and expended for the use and benefit of the defendant at his special instance and request, between November 1, 1899, and September 2, 1903. Frank thereafter died and the executor of his will was substituted as plaintiff in his stead. In November, 1899, Frank and the defendant being the owners of the Gem quartz lode mining claim situate in Silver Bow county, the former of a three-fourths interest and the latter of the remaining interest, began to conduct mining operations thereon, each agreeing to bear his proportionate share of the necessary expense. Frank assumed personal charge of the work, paid the entire expense, and from time to time rendered to the defendant statements of the amount due from him. These amounts were paid. This plan was pursued until the enterprise was abandoned by the defendant, as he claims, on July 31, 1901, or, as plaintiff claims, on October 5, 1901. Thereafter Frank remained in possession of the joint property until some time subsequent to January, 1907, when it was sold; but whether he continued active mining operations does not appear. During the time intervening between November 17, 1902, and November 24, 1903, he expended for watchmen to guard the buildings upon the property, and for insurance, *etc.*, \$1,810.50. For the time intervening between the latter date and January 1, 1907, he leased the shaft upon the property to F. A. Heinze, who used it to develop adjoining property. On this account he was paid by Heinze \$1,900. The balance for which recovery is sought is made up of defendant's proportion of the amounts expended in the conduct of the joint operations during July, August, September and five days of October, 1901, together with the sum expended for insurance, *etc.*, with interest, less a credit of a one-fourth of \$1,900 as of date of January 7, 1907, when payment of it was made. The defendant denies that any amount is due. He alleges that on September 14, 1901, he notified Frank that he would no longer be responsible for any of the costs or expenses of operating the property; that on October 5 he again gave notice to Frank in

writing that the agreement was at an end; that on or about that date, or a short time prior thereto, he and Frank had a final accounting and settlement of all the matters alleged in the complaint, except the amount expended for watchmen, *etc.*, liability for any part of which he denies; and that upon such settlement he paid to Frank all sums of money claimed by him to be due on account of their joint operations prior to that date. The defendant's answer also alleges a counterclaim for \$3,125, money overpaid to Frank at the time of the settlement. This claim was abandoned at the trial, the parties submitting evidence upon the issue of final accounting and settlement. The court found generally in favor of the defendant and awarded him judgment for costs. Plaintiff has appealed from an order denying his motion for a new trial, and has submitted the question whether the evidence is sufficient to justify the finding.

The action was brought as one at law. The parties proceeded in the trial upon the theory that it is an action at law. We shall not discuss the question whether this is the correct theory. We must, however, accept the position which the parties defined for themselves in the trial court and consider the case accordingly, though counsel for defendant now earnestly contends that we should review the case as one in equity for a partnership accounting; for notwithstanding it is the settled rule, as he [1] contends, that one partner cannot prior to a settlement and accounting sue his copartner at law with reference to the partnership transactions or dealings (*Riddell v. Ramsey*, 31 Mont. 386, 78 Pac. 597; *Boehme v. Fitzgerald*, 43 Mont. 226, 115 Pac. 413; *Doll v. Hennessy Mercantile Co.*, 33 Mont. 80, 81 Pac. 625), [2] it is also the rule, equally well settled, that after a party has assumed a defined position in the case in the trial court, he may not thereafter assume a different position in this court. (*Dempster v. Oregon Short Line R. R. Co.*, 37 Mont. 335, 96 Pac. 717; *Galvin v. O'Gorman*, 40 Mont. 391, 106 Pac. 887; *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775.) There are recognized exceptions to the general rule as announced in these cases, but this case does not fall within any of them. (21 Ency. Pl. &

11, 1904). If counsel desired to avail himself of the rule which he now invokes he should have done so in the trial court by appropriate motion. 15 Ency. Pl. & Pr. 1010; *Kunneke v. Mapel*, 101 Ohio St. 1, 53 N. E. 259). Instead of doing this, however, he relied upon a settlement of the partnership affairs and a final discharge of defendant from his association with it, by payment of the ascertained balance due from him in September, 1901. He is bound to retain the position thus assumed. His apparent reason for a change of position, though not stated in so many words, is that, whatever may be the condition of the evidence upon the issue tried, this court should, in reviewing the case, hold that the plaintiff is subject to the imputation of lack, and hence that he ought not to recover.

Passing to the merits of the case as made, we do not think the conclusion reached by the trial court should be disturbed. [3] It would serve no useful purpose to reproduce and analyze the evidence in detail. The plaintiff's evidence tended to show that the dissolution of the partnership took place on October 5, 1901, and that there was then chargeable to defendant his share of the expenses incurred for the months of July, August and September, and that these items, together with the amounts subsequently expended for watchmen, etc., less a credit for defendant's proportionate share of the rent received from Heinze, have not been paid. To fix the date of the settlement he relied upon a written notice sent to Frank by defendant on that day, in which he told Frank that he would not thereafter be responsible for any further outlay upon the mining operations. The defendant relied upon a verbal notice of dissolution, which he testified he had given Frank about the middle of July that he would not be responsible after August 1, and also a receipt in full for all charges due from him for the months of April, May and July. This receipt he obtained from Frank on August 14. He testified that at that time he and Frank had full understanding and settlement, and that he thereupon cashed the check for the balance then due. The receipt and check tend to corroborate his statement. Questioned

with reference to the written notice of October 5, he stated that at that time, being about to leave the state to be away for some time, he wished to have a record of the dissolution of the partnership, and hence, though he deemed the verbal dissolution had in July sufficient, it would be safer to have written evidence of it. His statement that the final settlement occurred in September in pursuance of the verbal notice by him in July, is further corroborated by the fact that Frank did not, so far as the record discloses, make any demand upon him for further payments until sometime in the year 1902, whereas prior to that time demands for payment had been made at comparatively short intervals.

Counsel for plaintiff insists that the fact that defendant gave the written notice on October 5, couched in the terms it was, furnishes conclusive proof that defendant's claim that a settlement and dissolution was accomplished by a verbal notice in July, is without foundation. It is true that the notice impliedly assumes the existence of the partnership up to the time at which it was given, and thus tends to impeach the defendant's testimony as to the verbal notice; yet in view of the other evidence heretofore referred to, corroborative of his testimony on this subject, it was the exclusive province of the trial court to determine the credibility of his story and find accordingly. Its determination, after seeing and hearing the witnesses and on the motion for a new trial, must be accepted as final just as would the verdict of a jury had one been called to try the issues.

It has not escaped our notice that the dates referred to by the witnesses do not agree with those alleged either in the complaint or answer. The court seems to have regarded these variances as immaterial. Except so far as they reflect upon the credibility of the witnesses, we think they were immaterial.

Counsel have discussed in their briefs the question whether under the evidence the defendant ought to be charged with any part of the outlay made by Frank for watchmen, insurance, *etc.* If it be assumed that under the circumstances disclosed he ought to pay his share of this amount, less a credit for his proportion

of the rent received by Frank, the balance is in his favor. He knew Frank had been caring for the property and that he had collected the rent. He did not in his answer assert, by way of counterclaim, the right to recover a share of the rent. It may, therefore, be assumed that he was content to allow Frank to reimburse himself out of the rent for the expense of protecting the property.

The order is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

Rehearing denied January 31, 1914.

MARLOWE, RESPONDENT, v. MICHIGAN STOVE CO.
APPELLANT.

(No. 3,319.)

(Submitted November 22, 1913. Decided December 18, 1913.)

[137 Pac. 539.]

Justices' Courts—Notice of Appeal—Defective Undertakings—Sufficiency—Amendments—Erroneous Dismissal.

Justices' Courts—Notice of Appeal—Sufficiency.

1. A notice of appeal from a judgment rendered by a justice of the peace is sufficient if from its contents the adverse party can ascertain what he must do to protect his rights in the further proceedings to be had in the appellate court; hence failure to state the amount of the judgment appealed from did not invalidate such a notice where it was otherwise sufficiently specific to give the information first above referred to.

Same—Undertaking on Appeal—Sufficiency.

2. An undertaking on appeal to the district court which meets all the requirements of section 7124 relative to amount and conditions, is not rendered invalid by the insertion of additional conditions not in anywise affecting the liability of the sureties under the statute.

Same—Defective Undertakings—Amendment—Dismissal.

3. The rule that where the original undertaking on appeal to the supreme court is not wholly void but merely defective and therefore amendable, the filing of a substituted one preserves the appeal if ap-

proved by a justice of the supreme court under section 7116, Revised Codes, *held* applicable to substituted undertakings on appeals to district courts, filed and approved as provided by section 7128.

Same—Defective Undertaking—Amendment—Erroneous Dismissal.

4. *Held*, under the rule *supra*, that an undertaking on appeal from a justice's court which in one clause effectively secured the payment of costs and in another attempted to do likewise with reference to the judgment but failed, though wholly void as to the latter clause, was good as to the former, and therefore an amended undertaking approved by a district judge rendered the appeal proof against dismissal for insufficiency.

'Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

ACTION by Thomas N. Marlowe against the Michigan Stove Company. Judgment in a justice's court for plaintiff, and, from an order of the district court dismissing its appeal, defendant appeals. Reversed and remanded.

Mr. D. F. MacMartin, for Appellant, submitted a brief; *Mr. C. W. Wiley*, of Counsel, argued the cause orally.

Mr. W. W. Patterson, and *Mr. Thos. N. Marlowe*, *pro se*, submitted a brief in behalf of Respondent; *Mr. Patterson* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was commenced in the justice's court of Hellgate township, Missoula county, on March 7, 1912, to recover the sum of \$75 alleged to be due plaintiff for services rendered to defendant at his special instance and request, as an attorney at law. On November 15, plaintiff was awarded judgment for \$44.50, with costs. The defendant having given notice of appeal to the district court and filed his undertaking with the justice, the record was lodged with the clerk of the district court on December 9. Counsel for plaintiff thereupon filed a motion to dismiss the appeal on the grounds (1) that the notice of appeal was insufficient, and (2) that the undertaking was insufficient. To obviate the objection to the undertaking, the defendant, on January 11, 1913, and prior to the submission of the motion,

filed a new undertaking, approved by one of the judges of the district court. The motion was thereafter heard and sustained, and on February 8, 1913, formal judgment of dismissal was entered. The defendant has appealed.

It does not appear upon which ground of the motion the court based its action. If it was based upon the first ground, it was error. The purpose of the notice is to give to the adverse party [1] information of the fact that the cause has been removed to the appellate court, so that he may appear and protect his rights in the further proceedings to be had therein. (*State ex rel. Rosenstein v. District Court*, 41 Mont. 100, 21 Ann. Cas. 1307, 108 Pac. 580; *Davidson v. O'Donnell*, 41 Mont. 308, 110 Pac. 645; *Jenkins v. Carroll*, 42 Mont. 302, 112 Pac. 1064; *Valadon v. Lohman*, 46 Mont. 144, 127 Pac. 88.) This being its purpose, obviously it must convey to the adverse party sufficient information to enable him to know what is required of him. It need not go further. The notice in this case is almost identical in form and substance with that considered in *Valadon v. Lohman*, *supra*; and, while it does not mention the amount of the judgment, there can be no doubt that it served to give to plaintiff all the information it was necessary for him to have.

7128 of the Revised Codes provides: "No appeal shall be taken for insufficiency of the undertaking thereon, or for any defect or irregularity therein, if a good and sufficient undertaking be filed in the district court at or before the hearing on the motion to dismiss the appeal, which undertaking must be approved by the district judge." While the second undertaking is not a model in form, it is in twice the amount of the undertaking required by the statute, including costs, and stipulates for payment of the costs and costs upon a withdrawal or dismissal of the appeal, and the amount of any judgment and all costs that may be awarded against the defendant in the action in the district court. It meets all the requirements of the statute prescribing the amount and conditions of such an undertaking. (Rev. Code, § 7124.) It is not rendered invalid by reason of the fact that it contains other conditions, as in the case here, that it contains other conditions

than those prescribed by the statute, but which do not in any wise affect the liability of the sureties under the conditions prescribed. Section 7116, relating to dismissal of appeals by the supreme court, contains a provision substantially the same as section 7128, *supra*. This provision was considered and construed by this court in *Pirrie v. Moule*, 33 Mont. 1, 81 Pac. 390. It was held that, when the original undertaking on appeal is void, the filing of the substituted undertaking, though approved as therein required, does not preserve the appeal; the purpose of the provision being to preserve the appeal only when the undertaking has not wholly failed to meet the requirements of sections 7100 *et seq.*, prescribing the mode of taking appeals to the supreme court. Since the reason for the enactment of both provisions is the same, the construction given to the former must, we think, be given to the latter also. Whether, therefore, the order of dismissal here can be sustained on the second ground of the motion depends upon a determination of the question whether the first undertaking was void for all purposes or was only insufficient in the sense that it did not meet all the requirements of section 7124.

Aside from the formal recitals, the undertaking consists of [4] two paragraphs. In the first the sureties undertake and promise that "the appellant will pay all costs which may be awarded against him on appeal or on a withdrawal or dismissal thereof, not exceeding \$117.80," the sum so specified being twice the amount of the judgment and costs. The second paragraph is as follows: "And, whereas, the appellant is desirous of appealing said action and staying the execution of said judgment, jointly and severally undertake and promise in the further sum of \$117.80, said sum being the amount of double the amount of said judgment so appealed from and costs; that if said judgment appealed from be affirmed or the appeal dismissed or withdrawn, or if judgment be recovered against him in the said action in the district court, not exceeding the sum of \$117.80." It is apparent that the person who drew this instrument proceeded upon the assumption that it was necessary to make separate

provisions, one to secure the payment of the costs, as distinguished from the judgment proper, and one to secure payment of the judgment itself. It must be conceded that the second clause is wholly abortive, because its terms are not sufficiently definite and explicit to impose upon the sureties any obligation to pay any amount upon any contingency to any person, though it indicates a purpose to bind them to pay the judgment upon the happening of any of the contingencies prescribed by the statute. The first clause, however, contains a specific promise to pay an ascertainable amount upon the happening of any one of the contingencies prescribed, and is not wholly abortive because it fails to name the plaintiff as the obligee. The obligation assumed could not be discharged otherwise than by payment to the plaintiff of the costs awarded on the appeal, or on a withdrawal or a dismissal thereof. For illustration: If a new undertaking had not been substituted, and after a final disposition of the action in favor of plaintiff by trial, or withdrawal or dismissal of the appeal, in an action brought against the sureties to recover the amount of the judgment and costs, they would not be permitted to say that they had not bound themselves to pay the costs. The undertaking was therefore good as an undertaking to pay costs of the appeal, and for that reason is not wholly void.

The judgment is therefore reversed and the cause remanded for further proceedings.

Reversed and remanded.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

STATE EX REL. GRAVELY, RELATOR, v. STEWART ET AL.,
RESPONDENTS.

(No. 3,408.)

(Submitted December 1, 1913. Decided December 29, 1913.)

[137 Pac. 854.]

*Mandamus—School Lands—Sales—Approval and Confirmation
—Inadequacy of Price—State Board of Land Commissioners—
Discretion.*School Lands—Federal Grant—Trust—State Board of Land Commissioners
—Nature of Duty.

1. The land grant made by the federal government to the state for school purposes constitutes a public trust, which the state board of land commissioners must so administer as to secure the largest measure of legitimate advantage to the state.

Same—Sales—Approval and Confirmation—Discretion—*Mandamus.*

2. In determining whether it shall or shall not confirm a sale of state school lands, the state board of land commissioners acts *quasi-judicially*, and may not, in the absence of abuse of its discretion, be compelled by *mandamus* to confirm a sale made by the register at a price which the board deems inadequate.

Same—Sales—Not Complete Without Approval.

3. Bidders at sales of state school lands take the land bid in by them, with the knowledge that the sale is not complete, under section 40, Chapter 147, Laws of 1909, without the approval and confirmation of the state board of land commissioners, and that in its action on a particular sale it will be governed by the interests of the trust which it is charged to administer.

Original application by the state, at the relation of C. A. Gravelly, for a writ of mandate to compel S. V. Stewart, governor, and others, as members of the state board of land commissioners, and Sidney Miller, as register of state lands, to confirm a sale of state school lands and perform certain other acts with reference thereto. Proceedings dismissed.

Mr. S. P. Wilson, for Relator, submitted a brief, and argued the cause orally.

Mr. D. M. Kelly, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, submitted a brief in behalf of Respondents, and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On or about July 1, 1913, the state board of land commissioners made an order directing the sale of certain school lands, to be held at Deer Lodge, Powell county, on August 15, 1913. The sale was duly advertised, and included within the lands directed to be sold were three tracts of 160 acres each, in section 10, township 10 north, range 8 west. At the time and place set, the register of state lands appeared, and at public auction offered these tracts for sale in separate parcels. For them the relator herein made the highest and best bids, offering \$10 per acre for one of said tracts, and \$10.25 per acre for each of the others; and the said tracts were struck off to him by the register, acting as auctioneer. The relator paid to the register fifteen per cent of the purchase price, together with the fees for issuing the certificate of sale, which moneys were received by the register, who in turn delivered a receipt to the relator. Subsequently the relator made demand that a certificate of purchase be issued and delivered to him, but this was refused; thereupon he tendered and offered to the state board of land commissioners the full purchase price as bid by him, with interest, and offered to pay the appraised value of all surface improvements owned by former lessees, and at the same time demanded the issuance and delivery to him of deeds or patents to said tracts. But the state board, refusing to confirm the sale, canceled and disapproved it, rejected the relator's tender, and denied his demand. It is alleged in the petition that the sale was fair, the sums bid were equal to the value of the land, and that the actions of the board and of the respondents, as members thereof, were arbitrary, malicious, capricious and unjust.

In their reply the respondents state their position as follows: "That subsequent to the time when said land was offered for sale, and the said bid so made by said plaintiff, the said register made due report thereof to the state board of land commissioners, and that at a hearing subsequently had thereon, at which hearing said plaintiff was represented, the said state board of land commissioners was informed and believed, and still believes, that

the price so bid for said land by said plaintiff was inadequate, and was less than the real value of said land; that the same at a subsequent sale could be sold at a much greater price; that in fact at said hearing said board received offers in writing for said land at a price of \$3 per acre in excess of the amount so bid at said sale, and, deeming it to the best interests of the state of Montana that said sale be not confirmed and in and by virtue of the authority so vested in said board by the provisions of section 40, Chapter 147 of the Session Laws of 1909, refused to confirm or approve the sale of said lands, and refused, and still refuses, to issue any deed of conveyance to said plaintiff for said land."

Upon the hearing it was established by evidence that the action of the board was prompted by the views set forth in the reply. No reason, however, was assigned for the entertainment of these views, except that the board had received a letter from one McGilvray offering \$3 per acre or \$1,440 more for the land, and believed that under the special circumstances it might, on a resale, secure as much as \$30 per acre.

The question, then, is whether, under the circumstances stated, the peremptory writ of this court should issue as prayed by the relator, directing that the board confirm the sale to him and cause to be issued a certificate of purchase accordingly, directing that the board accept his tender of the balance of the purchase price and cause to be issued and delivered to him a deed or patent to the lands, and directing the governor to sign, the register to countersign, and the secretary to seal, such deed or patent. To this but one answer can be given—an unhesitating negative. The grant of lands for school purposes by the federal [1] government to this state constitutes a trust (*State ex rel. Bickford v. Cook*, 17 Mont. 529, 43 Pac. 928; *State ex rel. Dildine v. Collins*, 21 Mont. 448, 53 Pac. 1114; *State ex rel. Koch v. Barret*, 26 Mont. 62, 66 Pac. 504); and the state board of land commissioners, as the instrumentality created to administer that trust, is bound, upon principles that are elementary, to so administer it as to secure the largest measure of legitimate advantage

to the beneficiary of it. To that end, and of necessity, the board must have a large discretionary power over the subject of the trust; and therefore it has been expressly given "the direction, control, leasing and sale" of these lands, under such regulations and restrictions as may be prescribed by law. (Const., Art. XI, sec. 4.) Such "regulations and restrictions" as the legislature has seen fit to prescribe are embodied in Chapter 147, Session Laws of 1909, wherein we find the following provisions: The board shall have the direction and control of all lands belonging to the state, to manage the same as the best interests of the state shall require (sec. 1); the board may direct the sale of any state lands, except as provided in this Act, in such parcels as they shall deem for the best interests of the state (sec. 35); all sales of state lands shall be conducted by the register, but no land shall be sold for less than the minimum price of \$10 per acre, nor for less than its appraised value (sec. 37); "all sales of state lands * * * shall be subject to the approval and confirmation by the state board of land commissioners, and no sale shall be deemed completed until after such approval and confirmation" [2] (sec. 40). That the board in proceeding under this statute, in determining whether it shall or shall not confirm a sale, acts *quasi-judicially* seems so obvious that the citation of authority ought not to be necessary. The matter has been before the courts, however, and with substantial uniformity of result, under conditions at all similar to those prevailing in this jurisdiction. (*Routt v. Greenwood etc. Land Co.*, 18 Colo. 132, 31 Pac. 858; *State ex rel. Reed v. Scott*, 18 Neb. 597, 26 N. W. 386; *State ex rel. Marsh v. Land Commissioners*, 7 Wyo. 478, 53 Pac. 292; *Miles v. Wells*, 22 Utah, 55, 61 Pac. 534; *State ex rel. Rutledge v. Eaton*, 78 Neb. 202, 110 N. W. 709.)

Since the board is a constitutional agency charged with the administration of a public trust, since it is vested with discretionary power in that behalf, and since its discretion is invoked whenever it is called upon to confirm or reject a sale, this court cannot compel it to exercise that discretion in any particular way. (*State ex rel. Harris v. District Court*, 27 Mont. 280,

70 Pac. 981; *State ex rel. King v. District Court*, 25 Mont. 202, 64 Pac. 352; *Montana Ore Pur. Co. v. Lindsay*, 25 Mont. 24, 63 Pac. 715; *State ex rel. Independent Pub. Co. v. Smith*, 23 Mont. 329, 58 Pac. 867.)

In *State ex rel. Reed v. Scott*, *supra*, it was said: "The board of educational lands and funds is a trustee for the sale and leasing of the land set apart for the support of educational institutions, and, to justify the interference of a court, there must be an abuse of the trust. * * * It is the duty of the board to sell or lease the educational lands of the state for the highest price possible to be obtained, and increase and protect by all honorable means the funds for the support of the educational institutions; and, so long as the board is faithfully performing its duty in that regard, this court will refuse to interfere." If this be sound, as we think it is, then in the course complained of the board was actuated by the very considerations which are supposed to govern it. It therefore cannot be said that there was a manifest abuse of its discretion, but the case is resolved into the mere inquiry whether these considerations were entertained upon an erroneous or insufficient basis. *Mandamus* cannot be invoked to aid such an inquiry. (*State ex rel. Independent Pub. Co. v. Smith*, *supra*; *Ex parte Newman*, 14 Wall. (U. S.) 152, 20 L. Ed. 877; *Douglass v. Commonwealth*, 108 Pa. 559; *Hoole v. Kinkead*, 16 Nev. 217.)

Nor from the bidder's point of view can any just complaint be [3] made of this conclusion. Bidders at sales of school lands are bound to know that no sale by the register is complete without the approval and confirmation of the board, and that the board in confirming or rejecting a sale by the register will be governed by the interests of the trust which it is charged to administer. The situation of the parties to a sale by the register is thus quite analogous to that of parties to a sale by a receiver, concerning which this court said: "The purchaser at such sale takes the property with notice that the court has power, in its discretion, to set it aside; that, while mere inadequacy of consideration is not ordinarily in itself sufficient to warrant the

court in setting aside a sale to a *bona fide* purchaser, if it shall appear that for some reason, disclosed or undisclosed, the property has been greatly undersold, and the purchaser has, even in good faith, obtained an undue advantage of the persons for whose benefit the sale was made, the court may, in its discretion, set it aside." (*Gazette Printing Co. v. McConnell*, 45 Mont. 89, Ann. Cas. 1913C, 1327, 122 Pac. 561.)

It follows that the proceeding must be dismissed, and it is so ordered.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STEPHENS, APPELLANT, v. CONLEY, RESPONDENT.

(No. 3,320.)

(Submitted November 18, 1913. Decided January 6, 1914.)

[138 Pac. 189.]

Convicts—Regulations—Liability of Warden—Commutations—False Imprisonment—Assault—Malicious Prosecution—Pleadings—Curing Defects—Answer—New Matter—Reply—Appeal—Notice—Sufficiency.

Appeal—Notice—Sufficiency.

1. A notice of appeal which, though informal and indefinite in the extreme, must have apprised defendant that plaintiff's purpose was to appeal from a judgment entered on a given date in favor of the former and against the latter, *held* proof against dismissal on the ground of insufficiency.

Convicts—Assault—Personal Liability of Warden—Officers—Presumptions—Complaint—Insufficiency.

2. Complaint of an ex-convict in an action against the warden of the state prison to recover damages for an assault committed upon his person as well as for certain personal indignities inflicted upon him, such as being confined in the same cell with an insane prisoner and a negro, *etc.*, *held* not to state a cause of action in the absence of an allegation negating the presumption that the acts complained of were done by defendant in the performance of his official duties as warden.

Appeal and Error—Correct Result—Wrong Reason—Affirmance.

3. If a decision of the trial court is correct, though based upon an erroneous reason, it will not be disturbed on appeal.

False Imprisonment—Gist of Action.

4. The gist of the offense of false imprisonment, as defined in section 8324, Revised Codes, is the unlawful detention.

[As to the liability for malicious prosecution, see notes in 26 Am. St. Rep. 127; 93 Am. St. Rep. 454. Advice of counsel as defense to action for malicious prosecution is the subject of a note in Ann. Cas. 1912D, 423.]

Convicts—Good-time Allowance—Failure to Grant—False Imprisonment—Complaint—Insufficiency.

5. To justify an ex-convict in bringing an action for false imprisonment against the warden of the state prison because of the failure of defendant to deduct from the sentence imposed upon him by the judgment of imprisonment the good-time allowance provided for by section 9737, Revised Codes, he must be able to show that the board of prison commissioners had granted him such commutation but that defendant had refused to deduct the credits allowed; otherwise the complaint fails to state a cause of action.

[As to what constitutes false imprisonment, and the liability therefor, see notes in 67 Am. St. Rep. 408; 118 Am. St. Rep. 719.]

Pleading and Practice—Answer—New Matter—Reply.

6. The "new matter" in an answer which, under section 6560, Revised Codes, calls for a reply is such only as calls for a defense or a counterclaim, anything else not being new matter within the meaning of the Practice Act.

Same.

7. If the facts stated in the answer can be proved under a general denial, they do not constitute new matter within the meaning of the Practice Act, and failure to reply does not amount to an admission of the truth of the matters stated.

Same—General Denial—Issues—Evidence.

8. Under a general denial the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish to sustain his action.

Malicious Prosecution—Pleading and Proof.

9. In order to make out a *prima facie* case of malicious prosecution, the plaintiff must allege and prove the commencement of a prosecution against him through defendant's instigation, want of probable cause, malice, favorable termination of prosecution, the damage suffered and the amount thereof.

Same—Argumentative Denials—Reply Unnecessary.

10. In an action for malicious prosecution, affirmative allegations of the answer showing probable cause, advice of counsel, absence of malice, and good faith on the part of defendant, held argumentative denials, making a reply to them unnecessary.

Pleading—Insufficiency—Defect Cured by Pleading of Adversary.

11. A defective pleading is cured when a material fact omitted therefrom has been supplied by allegation in the pleading of the adverse party.

Malicious Prosecution—Defective Complaint—Cured by Answer.

12. *Held*, under the rule declared in paragraph 11 above, that plaintiff's failure to allege that a judicial proceeding had been instituted or prosecuted against him was supplied by defendant's statement that he caused a criminal prosecution to be brought against plaintiff, describing the particular steps taken; *held*, further, that his omission to plead a favorable termination of the action was cured by defendant's allegation

that plaintiff was by an order of the district court discharged from custody and from prosecution on the charge preferred.

Appeal and Error—Review—Scope.

13. On appeal from a judgment erroneously dismissing an action on the ground that the complaint did not state a cause of action, the defects in which pleading were cured by the answer, the supreme court is not concluded from ordering a new trial because of appellant's failure to call the trial court's attention to the curative effect of the answer.

Appeal from District Court, Powell County; W. R. C. Stewart, Judge of the Ninth Judicial District, presiding.

ACTION by Oram Stephens against Frank Conley. Judgment for defendant and plaintiff appeals. Affirmed in part and reversed in part.

Mr. Chas. A. Wallace, for Appellant, submitted a brief; *Mr. L. M. Van Etten*, of Counsel, and *Mr. Wallace* argued the cause orally, and submitted a brief in reply to that of Respondent.

First cause of action: The warden of the state prison is not permitted to ignore his duty under section 9742, Revised Codes, or to abuse his discretion in regard to the exercise of his opinion as to when a prisoner is insane; and if he does so, and keeps and imprisons a violently insane prisoner in a cell with another prisoner, for the sole and only purpose of humiliating, oppressing, vexing and annoying said prisoner, then he is responsible for any injuries caused thereby.

In the second cause of action it is alleged, and the answer admits, that plaintiff was kept, detained and imprisoned in the state prison by defendant, for a period of 177 days after his term had expired; and the question in this case is whether or not this allegation constitutes a cause of action in damages against the defendant and in favor of the plaintiff. We contend, that, as decided in *In re Wadleigh*, 82 Cal. 518, 23 Pac. 190, section 9737, Revised Codes, providing for commutation of sentence upon good behavior, fixes the term of imprisonment upon certain conditions, and that this statute entered into and became a part of the judgment of the court, and when a defendant is sentenced to imprisonment, as in the case of appel-

lant, for a period of four years, it means four years subject to the deductions allowed from such time by law, and appellant's term of imprisonment expired September 12, 1910, the same being three years and two months from the 12th day of July, 1907. In *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 130, Kent, Ch., said a person attainted is not absolutely at the disposal of the crown. He is so for the end of public justice, and for no other purpose, and that if beaten or maimed while under attainder, or if a woman was ravished while under attainder, and a pardon afterward ensued, the party injured might maintain an action. One convicted of a felony is not thereby disqualified from suing for personal injuries received during his imprisonment. (*Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. 435; see, also, *Fite v. State*, 114 Tenn. 646, 4 Ann. Cas. 1108, 1 L. R. A. (n. s.) 520, 88 S. W. 941.)

In *In re Canfield*, 98 Mich. 644, 57 N. W. 807, it was held that the right of a convict to a prescribed reduction from his sentence upon compliance with the rules of the prison, was one of which he could not be deprived, and that a later Act, the effect of which was to deprive a person sentenced under the prior statute of this right in part by reducing the amount of his credits, was to that extent an *ex post facto* law, because its effect was to increase, and not to mitigate, his punishment. It was held, therefore, that the prisoner was entitled to credit upon the basis of the statute under which he was sentenced.

Normally, any and every natural person, irrespective of his public or private character or his personal status, is liable in an action for false imprisonment whenever such person appears to have unlawfully detained another. (19 Cyc. 332.) Section 8324, Revised Codes, defining false imprisonment, makes no distinction in persons committing the offense, and we are unable to distinguish the acts of the warden of the state penitentiary from those of a private individual.

The third cause of action is not against the warden, but against the respondent personally, and is a cause of action for false arrest and malicious prosecution committed by said re-

spondent against this appellant, which is actionable under the law. Our statute, section 8908, Revised Codes, is specific in its language: that prisoners are under the protection of the law, and any injury to their person not authorized by law is punishable in the same manner as if they were not convicted or sentenced. (*Westbrook v. State*, 133 Ga. 578, 18 Ann. Cas. 295, 26 L. R. A. (n. s.) 591, 66 S. E. 788.) Treating false imprisonment as a tort, as distinguished from a crime, the only defenses which may be interposed are a denial of the imprisonment and a justification thereof. (*Kroeger v. Passmore*, 36 Mont. 504, 14 L. R. A. (n. s.) 988, 93 Pac. 805.)

Messrs. Rodgers & Rodgers, C. F. Kelley, L. O. Evans, and S. P. Wilson, for Respondent, submitted a brief; *Mr. W. B. Rodgers* argued the cause orally.

Plaintiff's first pretended cause of action does not state any facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, and therefore the ruling of the court excluding plaintiff's testimony and dismissing said pretended cause of action was correct. The duties of the defendant as warden are in the highest sense duties owing to the public, and the matter of the infliction of punishments upon convicts confined in the penitentiary for the violation of rules, misconduct, misbehavior, the treatment of convicts in the suppression of mutiny—that which is necessary to be done to prevent escapes and everything appertaining to the good order and discipline of the prison and its inmates—is a matter committed to his discretion, subject to the laws of the state and the rules and regulations of the state board of prison commissioners, and his action thereon is *quasi* judicial and discretionary, and therefore, under no circumstances may a civil action be maintained against such warden upon the complaint of a convict for damages upon such matters as are alleged and set out in plaintiff's first cause of action. The rules and regulations, having been made by the board with authority and by virtue of statutory law, have the force and effect of law, and of these

rules and regulations every court within the state is bound to take judicial notice. They were open to the court for its consideration upon the objections made to the sufficiency of the complaint in this case. (*United States v. Williams*, 6 Mont. 379, 12 Pac. 851; *Cosmos Exploration Co. v. Gray Eagle Co.*, 190 U. S. 301, 47 L. Ed. 1064, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860; *United States v. Southern Ry. Co.*, 187 Fed. 209; *Whitney v. Spratt*, 25 Wash. 62, 87 Am. St. Rep. 738, 64 Pac. 919; *Wabash Ry. Co. v. Campbell*, 219 Ill. 312, 3 L. R. A. (n. s.) 1092, 76 N. E. 346; *Larson v. First Nat. Bank*, 66 Neb. 595, 92 N. W. 729; *Seaboard Air Line v. Shackelford*, 5 Ga. App. 395, 63 S. E. 252.)

Where a public officer is discharging duties for the benefit of the public, and is called upon to act *quasi* judicially, there can be no civil liability, notwithstanding facts are alleged showing malice upon the part of such officer; the motive of the officer cannot be inquired into, and the better rule draws no distinction between the acts of judicial officers and *quasi*-judicial officers. (Mechem on Public Officers, sec. 637.) In the case of *Wilkes v. Dinsman*, 48 U. S. 101, 12 L. Ed. 625, is found a conclusive decision showing that such duties as the warden of the penitentiary is called upon to perform are *quasi* judicial in their character. (See, also, *Schoettgen v. Wilson*, 48 Mo. 253; *Weaver v. Devendorf*, 17 N. Y. Com. Law, 117; *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557.) The principle that there can be no recovery against an officer acting in a *quasi*-judicial capacity, even though a malicious motive be alleged and proved, is firmly embedded in the decisions of the courts of California. (*Downer v. Lent*, 6 Cal. 94, 65 Am. Dec. 489; *Turpen v. Booth*, 56 Cal. 65, 38 Am. Rep. 48; see, also, *Dreucker v. Salomon*, 21 Wis. 621, 94 Am. Dec. 571; *Wilson v. Spencer*, 91 Neb. 169, 135 N. W. 546.) Should the warden violate the law, other and more effectual methods for the punishment of the warden are amply provided. In the first place, he is removable by his superiors. In the second place, under section 8908, Revised Codes, the state controls the warden and sees to his punishment, and if he has

violated any of the criminal laws or committed unjustifiable assaults upon the convicts, it is the sworn duty of the officers of the state to see that he is prosecuted and punished therefor. Such was the common law and such is the statutory law. (*Williams v. Adams*, 3 Allen (Mass.), 171; *Root v. Rose*, 6 N. D. 575, 72 N. W. 1022; *Sage v. Laurain*, 19 Mich. 137; *Jones v. Brown*, 54 Iowa, 74, 37 Am. Rep. 185, 6 N. W. 140; *Wall v. Trumbull*, 16 Mich. 228; *Amperse v. Winslow*, 75 Mich. 234, 42 N. W. 823; *State v. Smith*, 23 Mont. 44, 57 Pac. 449.)

But assuming that a recovery may be had against the warden of the state penitentiary upon allegation and proof of malice for such acts as those alleged and set out in plaintiff's first cause of action, nevertheless we assert that there is no statement of a cause of action against the defendant in this case. The acts alleged against the defendant are clearly within its jurisdiction, as shown by the common law, the rules and regulations of the board and the statutes of the state; in other words, under certain circumstances, he had authority to inflict the same. The presumption of law is, until the contrary appears by proper allegations, that the warden, being a public officer, did the things alleged in pursuance of his duty, and in a lawful manner, and before a cause of action could be stated against the warden, this presumption must be overcome by proper averments. (*Wightman v. Brush*, 56 Hun, 647, 10 N. Y. Supp. 76; *Wilkes v. Dinsman*, 48 U. S. 101, 12 L. Ed. 625; *Wilson v. Spencer*, 91 Neb. 139, 135 N. W. 546; *Going v. Dinwiddie*, 86 Cal. 633, 25 Pac. 129; *Schoettgen v. Wilson*, 48 Mo. 253.) True, the plaintiff alleges that some of the things charged were done by the warden willfully, maliciously and unlawfully. This allegation is not made with reference to the corporal punishments of which the plaintiff complains or the alleged assault upon him. It is alleged therein that the guards committed this assault unlawfully, willfully and maliciously, but, of course, the state of feeling of the guards in committing the assault cannot be imputed to the warden. The failure to allege substantial facts showing wrong upon the part of the warden or malicious intent can-

not be relieved, nor supplied by words of this character, however numerous or however often repeated. (*Fausler v. Parsons*, 6 W. Va. 486, 20 Am. Rep. 437; *Pratt v. Gardner*, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; *Triscony v. Orr*, 49 Cal. 612; *Miles v. McDermott*, 31 Cal. 270; *Courter v. Wood*, 3 N. J. L. 200 (617); *Despreaux v. Smock*, 3 N. J. L. 313 (744); *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 673.)

Plaintiff's second pretended cause of action does not state facts sufficient to constitute a cause of action against the defendant. It does not contain any statement (1) that the plaintiff, during the term of his imprisonment, had performed regular labor during good health, either within or without the state prison inclosures; (2) that the board of state prison commissioners had ever at any time granted to him any credit of time, as provided for in section 9737; (3) that during the term of his imprisonment he had never attempted to escape; and (4) that he had not committed or attempted to commit any assault upon his keeper, guard, officer or other convict, or otherwise endangered life, or that he had not been guilty of any flagrant disregard of any rule of the prison, or any misdemeanor; neither is there any allegation that the board had not forfeited any good time which he might otherwise have been entitled to; and that they had not, before such forfeiture, given him notice of the same. The authorities hereinbefore cited on the pretended first cause of action, and the argument thereon made in regard to the presumptions which attend upon the warden in regard to his liability for *quasi-judicial* acts in regard to the nature of his public duties, and other questions, are directly applicable and pertinent to this cause of action, and we invite the court's attention thereto and ask that the same be given full force and effect. (See, also, *Vanderheyden v. Young*, 11 Johns. (N. Y.) 151; *In re Canfield*, 98 Mich. 644, 57 N. W. 807.)

Plaintiff's pretended third cause of action does not state facts sufficient to constitute a cause of action against the defendant. A complaint for malicious prosecution must describe the crime charged against the plaintiff and must set out the nature of

and prosecution. 125 Cye 72; 13 Ency. Pl. & Pr. 427, 428; *Wesley v. Lorton*, 57 S. C. 252, 35 S. E. 558; *Adams v. Lancaster County*, 101 S. C. 151, 57 S. E. 157; *Seely v. Williams*, 53 S. C. 414, 36 L. R. A. 228, 71 S. E. 971; *Cochran v. Boner*, 1 Cal. App. 729, 32 Pac. 973. Tested by these rules it is apparent that the third cause of action is fatally defective for want of these allegations.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint attempts to set forth three causes of action for damages: (1) For assault and other personal indignities; (2) for false imprisonment; and (3) for malicious prosecution. Each charge arose out of transactions which occurred while plaintiff was imprisoned in the penitentiary, and while Conley was warden or contractor in charge of that institution.

After the cause was at issue and upon the trial, defendant objected to the introduction of evidence by the plaintiff, upon the ground that the complaint does not state a cause of action. This motion was sustained, and a judgment was entered dismissing the action and awarding defendant his costs. From that judgment plaintiff prosecuted this appeal. Respondent has moved [1] to dismiss the appeal upon the ground of insufficiency of the notice. The motion is overruled. The notice is informal, indefinite and reaches the very limits of defensible ground. It refers to the order of the court sustaining defendant's motion to exclude evidence. Such an order is not appealable (sec. 7099, Rev. Codes); but from the notice it may be gathered that the plaintiff's purpose was to appeal from the judgment in this action made and entered on June 27, 1912, in favor of the defendant and against the plaintiff.

In support of the motion counsel refer to the decision of this state *ex rel. Rosenstein v. District Court*, 41 Mont. 100, Cas. 1307, 108 Pac. 580; but in the later case of *Valachman*, 46 Mont. 144, 127 Pac. 88, we had occasion to re-examine the *Rosenstein Case* and to differentiate it from the then

instant case. In referring to the contents of a notice of appeal we said: "It must be deemed sufficient if upon its face the adverse party is given enough information to enable him to know what is required of him in order to protect his rights. This view not only permits, but requires, a reasonable construction of it in order that the appellant may not be defeated of his right for merely technical reasons. * * * The notice * * * contains the title of the cause, the date of the rendition of the judgment, the statement that it was rendered in favor of the plaintiff and against the defendant, and the title of the particular court that rendered it. The notice was sufficient."

The defects in the notice in this case are clearly the result of the misapprehension of counsel for appellant, as to what the judgment determined. They apparently confuse the order for judgment with the judgment itself, or proceed upon the theory that the preliminary recitals in the judgment constitute an essential part of it. So long as the notice serves the purpose of apprising the respondent of the judgment which it is sought to have reviewed, it is sufficient. The giving of a notice is not an indispensable step in taking an appeal. It does not serve any higher purpose than a summons, and its entire absence can be waived. (*Jenkins v. Carroll*, 42 Mont. 302, 112 Pac. 1064.) This court is commanded by statute to give its judgment without regard to technical errors or defects which do not affect the substantial rights of the parties. We are forbidden to idolize matters of form at the expense of substance, or to pay tithes of mint and anise and cumin while omitting the weightier matters of law.

ON THE MERITS

First Cause of Action. The plaintiff complains that while he [2, 3] was duly imprisoned in the penitentiary, the defendant, as warden in charge of that institution, caused him to be (a) confined in a cell with an insane Italian, and (b) with a negro, (c) to be shackled, manacled and placed in a dungeon and confined on a bread and water diet, and (d) assaulted, beaten and

wounded, his collarbone broken, and his head and chest cut and bruised.

(a. The complaint fails to allege that the Italian's insanity was known to the warden or to the guards or other prison officials, or that plaintiff ever made complaint or requested a change.

(b. While the plaintiff's refined sensibilities may have been shocked by his being compelled to share his cell with a negro, he fails to allege facts sufficient to state a cause of action for legal relief. Furthermore, the answer, while admitting the fact of plaintiff's confinement with the negro, alleges in justification that, on account of the crowded condition of the prison, it was necessary that someone be confined in the same cell with the negro, and this is not denied.

(c. All of plaintiff's allegations are predicated upon the premise that he was a convict, and that Conley was warden. The answer admits the facts that plaintiff was manacled, shackled, placed in a dungeon, and kept on a bread and water diet. It then sets forth in justification that the state prison board, pursuant to statutory authority, duly made and promulgated certain rules and regulations for the management of the penitentiary and the discipline of prisoners; that the punishments enumerated under this specific charge are species of punishments provided for by such rules, and that the infliction of the punishments upon the plaintiff was necessary to compel his submission to prison authority. The history of an incipient riot in the penitentiary is recited at length, and the part played by defendant is set forth. There is no denial of these facts, and, standing admitted, they amount to a complete justification, and defeat any right of recovery upon the part of the plaintiff, if any right he otherwise had.

(d. Standing alone, the assault upon the plaintiff, with the details of his injuries as depicted in this charge, seems cruel—barbarous—but plaintiff doubtless discreetly refrained from enlightening the court upon the surrounding circumstances, however, are fully supplied by the affirmative portion of answer to this charge, which amounts, in legal effect, to a

confession and avoidance, or, in other words, to a justification for whatever injuries were actually inflicted upon the plaintiff. The answer alleges that on March 8, 1908, this plaintiff, Geo. Rock, Wm. Hayes, and C. B. Young, all convicts in the penitentiary, entered into a conspiracy to escape from prison, and in pursuance of that purpose, and in the attempted execution of their plan, they murdered John Robinson, the deputy warden, and assaulted this defendant, the warden, with intent to kill and murder him, and did grievously wound him so that for many weeks thereafter he was nigh unto death; that this plaintiff, Stephens, actually participated in the murder of Robinson and the assault upon defendant; that thereafter Thos. McTague, co-contractor with this defendant in the management of the penitentiary, and having equal authority with him to maintain order and discipline in the prison, after a complete investigation of the mutiny referred to, ordered Stephens confined to a dungeon, that Stephens was contumacious and violent, and assaulted the guards detailed to execute McTague's order, and that in the necessary defense of themselves and in subduing Stephens the guards inflicted whatever injuries plaintiff sustained. There is not any denial of these facts, and, standing alone, they constitute a justification for the acts of which complaint is made, assuming that the complaint states a cause of action in the particular instance now under consideration. For this reason alone the ruling of the trial court should be sustained; for it is now the rule, too well established in this state to be open to further controversy, that if the decision of the lower court was correct, it will not be disturbed even though it may have been prompted by an erroneous reason. (*Marron v. Great Northern Ry. Co.*, 46 Mont. 593, 129 Pac. 1055; *Von Tobel v. City of Lewistown*, 41 Mont. 226, 137 Am. St. Rep. 733, 108 Pac. 910; *Menard v. Montana Central Ry. Co.*, 22 Mont. 340, 56 Pac. 592; *Winnicott v. Orman*, 39 Mont. 339, 102 Pac. 570.)

But the trial court's ruling was correct upon the theory of its rendition, and the complaint does not state a cause of action. The warden of the penitentiary is a public officer, and in this

instance he is sued as such, and for acts done by him in virtue of his office as warden. (*State ex rel. Stephens v. District Court*, 43 Mont. 571, Ann. Cas. 1912C, 343, 118 Pac. 268.) The presumption that official duty was regularly performed attaches to his acts (sec. 7962, subd. 15, Rev. Codes); and, since this pretended right of action arose while plaintiff was rightfully imprisoned, it was incumbent upon him, in order to put the warden in the wrong, to allege that his injuries did not result as the consequence of his wrongful or unlawful acts. In *Wightman v. Brush*, 56 Hun, 647, 10 N. Y. Supp. 76, an action similar to the one before us, a demurrer was sustained to the complaint, and properly so according to the supreme court. In justification of that conclusion the court said: "There is no allegation in the complaint that the acts done by the defendants were not in accordance with the regulations of the superintendent, or that they were not necessary for the proper punishment of the plaintiff, or to secure submission and obedience upon his part." For the reason that this complaint does not negative the presumption attaching to the warden's official acts, it does not state a cause of action.

Second Cause of Action. "False imprisonment is the unlawful violation of the personal liberty of another." (Sec. 8324, [4] Rev. Codes.) The gist of the offense is the unlawful detention. (*McCarthy v. De Armit*, 99 Pa. 63.)

No complaint is made of plaintiff's incarceration in the penitentiary in the first instance. His action proceeds upon the assumption that he was properly sentenced to a four year term [5] of imprisonment, but his contention is that, by virtue of the good-time allowance provided in our statute, he was entitled to his discharge as a matter of right, upon the expiration of three years and two months, in the absence of any showing that such allowance had been forfeited by the prison board. In many of the states this theory would be accepted at once, not because of any peculiar right in the plaintiff as a convict, but solely because of local laws, rules or regulations. Commutations for good conduct are purely matters of legislative control, and the

determination of the extent and character of the right in any given instance is referable entirely to the local statutes. (*Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047.) An examination of the provisions found in the laws of the different states discloses that they classify themselves generally into two groups. In the first are found those statutes which by their terms automatically reduce the period of imprisonment upon the rendition of the judgment. It is said, indeed, that a provision of this character forms a part of the judgment, and that under it the prisoner enters upon his confinement with the statutory assurance that his term is automatically abridged by law, unless by his own breach of prison discipline he forfeits the credits which inhere to his sentence. Under a statute of this character the presumption is in favor of the convict, and the burden is upon the state to show affirmatively the facts which defeat the claim to statutory allowances. (*Ex parte Wadleigh*, 82 Cal. 518, 23 Pac. 190; *In re Canfield*, 98 Mich. 644, 57 N. W. 807; *In re Kness*, 58 Kan. 705, 50 Pac. 939; *State ex rel. Davis v. Hunter*, 124 Iowa, 569, 104 Am. St. Rep. 361, 100 N. W. 510.) In the second group are those statutes which determine in advance the amount of credits—computed in days and months—which certain prisoners may earn upon certain specified terms and conditions. The commutation is held out as a reward for good conduct or efficiency in prison labor. A statute of this character cannot enter into the sentence or form a part of it, for the reward must first be earned before the prisoner is entitled to it. Our statutory provisions are very brief, and their terms somewhat indefinite, but the theory upon which they proceed is, we think, made sufficiently manifest. The government, supervision, and control of the penitentiary are lodged in the state board of prison commissioners. (Sec. 9716, Rev. Codes.) Among the powers and duties of the board, section 9737, Revised Codes, provides the following: “The board is hereby authorized and required to grant to any convict confined in the state prison, who shall well behave himself and who shall perform regular labor during good health, either within or without the state

prison inclosures, a credit of the time from his sentence as appears in the following table." The table mentioned designates in months the credits which may be earned. Upon a four year term they aggregate ten months. But it is to be observed, in the first instance, that by the language of the statute any allowance for good conduct or efficient labor has its source in a grant from the prison board, and does not spring from the operation of the law itself. The section quoted implies that some investigation must be made by the board, and a judgment formed thereon. There must be a finding that the convict has well behaved himself, and that he has performed regular labor during good health. These are conditions precedent to his right to any credits. Section 9738 seems to indicate a course of procedure for the board. In order to carry out the purpose of these statutes, the board must investigate the record of every convict, probably at the end of every year of his service, and grant the proper credits if earned, for the section declares that, if after a credit has once been earned, the convict commits any of the offenses enumerated, the board shall, upon proof of the fact, after notice to the convict, forfeit all deductions of time earned before the commission of such offense. New York, Pennsylvania, and doubtless other states have statutes somewhat similar to ours, and under any of these the burden is upon the prisoner to show that he has earned the credits by complying with the prison rules. 33 Cyc. 333; *In re Raymond* (D. C.), 110 Fed. 155. And even upon such showing he has but made a *prima facie* case against the board, and not any case of dereliction of duty upon the part of the warden. Doubtless, if the board arbitrarily refused to grant him credits fairly earned, the prisoner would have an adequate remedy; but it is only after the board has acted that the warden can be held derelict, and then a refusal to deduct the credits which have been so granted. In the absence of any showing that the prisoner earned the commutation which he might have under the law, and a further showing that the board had not granted the credits he claims, the plaintiff fails to state a case for false imprisonment.

When the judgment of imprisonment is entered, and the sheriff in execution of it delivers the convict to the penitentiary, he must also deliver to the warden a certified copy of the judgment (sec. 9380, Rev. Codes), and this is the evidence of the warden's authority for detaining the prisoner. If upon its face the judgment directs that he be confined in the penitentiary at hard labor for four years, the warden cannot release him sooner, except upon an order of the prison board or the judgment of a court of competent jurisdiction.

Third Cause of Action. In the answer to the third cause of action, defendant specifically sets forth that on March 6, 1911, he signed and verified a complaint in the justice of the peace court of Cottonwood township, Powell county, before M. E. Fee, justice of the peace, charging the said Oram Stephens with the crime of attempt to escape from the state penitentiary; that a preliminary examination was had; that Stephens was bound over to the district court; that the county attorney of Powell county filed an information against him for the same offense; and that on May 15, 1911, he was, by order of the district court discharged from custody and from prosecution upon said charge. The defendant, by way of special defense, so called, further alleges his belief in the truth of the charge which he made against Stephens, the fact that, before making it, he consulted and sought the advice of the county attorney, and after a full, frank and truthful statement of all the facts, he was advised by the county attorney that there was probable cause and sufficient ground for believing Stephens guilty, and that in making such charge he acted upon that advice. Not any of these facts are denied by a reply, and respondent insists that they are therefore to be deemed admitted, and, if admitted, they constitute a complete defense to the plaintiff's third cause of action, if any he has.

Was it necessary for plaintiff to reply to these affirmative allegations? That such an inquiry arises and is difficult of solution is of itself a reproach to the law. It is a most serious reflection upon our legislation that the ablest attorneys in this state—men of great learning and wide experience—cannot under-

stand the complex rules of procedure provided in our Civil Practice Act. But so long as legislative assemblies fix, by hard and fast statutes, mere rules of practice, this condition will continue. Under the Code of 1895 a reply was necessary only when the answer contained a counterclaim (Code Civ. Proc., sec. 720), and, as a counterclaim was defined, the statute was comparatively simple and quite generally understood, and doubtless for these [6] reasons was changed. By an Act approved February 22, 1899, the section above was amended so as to require a reply whenever the answer contains either a counterclaim or *any new matter* (Laws 1899, p. 142). With a further slight but immaterial amendment, that provision was carried into the Revised Codes, and is now found in section 6560. What is meant by the words "any new matter"? The legislature doubtless intended that they should be understood in the same sense as the like terms are employed in section 6540, which provides that an answer, aside from admissions and denials, may contain a statement of *any new matter* constituting a defense or counterclaim. If this be true, then the new matter, in an answer which calls for a reply, is only such new matter as constitutes either a defense or a counterclaim, and anything else is not new matter within the meaning of the Practice Act. Eliminating from further consideration any reference to a counterclaim—for there is not any contention that defendant's pleading falls within the definition of that term—and we are confronted with the inquiry: Does the answer contain a statement of new matter constituting a defense, within the meaning of the Code section above? If it does, a reply was required and, in the absence of one, the facts are admitted. If it does not, a reply was not necessary.

Any definition of the phrase "new matter constituting a defense" which may be adopted will require further definition or elucidation in order to be understood. In *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. 409, this court, after reviewing the authorities at length, said: "The defense of new matter, necessarily, either expressly or by implication, admits the averments of the complaint, and alleges facts that destroy their effect or defeat them.

If what is alleged amounts to a denial, it is not new matter; nor is it new matter if the facts alleged might have been proven under a denial. If that which is alleged amounts to a denial, or might be proved under a denial, no replication is required, but the defense of new matter must be denied, or it is admitted. It is therefore of vital importance to determine clearly what amounts to a denial, and what to new matter. And the rule for ascertaining this may be stated thus: Whatever facts are alleged in the answer, that might have been proved under a specific denial of the allegations of the complaint, may be considered as and are equivalent to a specific denial of such allegations, and require no replication; for such an answer forms an issue, and whatever averments of the answer amount to an admission of the allegations of the complaint, and tend to establish some circumstance or fact not inconsistent with all such allegations, constituting a defense or counterclaim, and which could not be proved under a specific denial, are new matter and require a replication." The rule appears to be, then, that if the [7] facts stated in the answer could have been proved under a denial of the allegations in the complaint, they do not constitute new matter within the meaning of the Practice Act, and the failure to reply does not amount to an admission of the truth of the matters stated as against the plaintiff.

"Under a general denial of the allegations in the complaint [8] the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish to sustain his action." (1 Ency. Pl. & Pr. 817.) In order to make out a *prima facie* case of malicious prosecution, the plaintiff was required to allege and prove: (a) That a judicial proceeding was commenced and prosecuted against him; (b) [9] that the defendant was responsible for instigating, prosecuting or continuing such proceeding; (c) that there was a want of probable cause for defendant's act or acts; (d) that he was actuated by malice; (e) that the proceeding terminated favorably to plaintiff; and (f) that plaintiff suffered damage, with the amount thereof. (13 Ency. Pl. & Pr. 427; Newell on Malicious

Prosecution, 397; *Wheeler v. Nesbitt*, 24 How. (U. S.) 544, 16 L. Ed. 765.) With the burden thus imposed upon the plaintiff [10] to allege and prove every one of these facts, it is apparent at once that there is not anything set forth in defendant's answer which could not have been proved under a general denial. The only purpose which the allegations of this answer can serve is to show probable cause, absence of malice, and the presence of good faith. These are but reasons why the defendant should not be held liable and such pleading has been aptly termed an argumentative denial. (*Rand v. Butte Electric Ry. Co.*, 40 Mont. 398, 107 Pac. 87.)

"If the defendant acted under the advice or opinion of legal counsel, this fact is relevant both to show probable cause and absence of malice." (Newell on Malicious Prosecution, 470.) Under a general denial the defendant "may prove probable cause, good faith, and absence of malice, advice of counsel, that the prosecution has not terminated, or that it was not instigated by the defendant." (13 Ency. Pl. & Pr. 458; 1 Ency. Pl. & Pr. 823.) In considering the question now before us, this court in *Smith v. Davis*, 3 Mont. 109, in treating of new matter similar to that found in this answer which had there been stricken from the answer on motion, said: "It was necessary for the plaintiff, in order to maintain the action, to allege in his complaint, and to establish by the evidence upon the trial, malice and the want of reasonable or probable cause. This is the gist of the action. It gives life to the complaint. And the defendant might have controverted every allegation that it became necessary for the plaintiff to prove in order to make out his case, under the general denial. It follows, therefore, that it was not necessary for the defendant to plead the absence of malice, or that he had reasonable or probable cause for his act in causing the arrest of the plaintiff, in order to establish his defense. The general denial was a sufficient answer, and under it all the matter contained in the second defense might have been and was introduced in evidence upon the trial."

Our conclusion is that the affirmative allegations in the answer do not constitute new matter within the meaning of section 6560 above, and that a reply to them was not necessary.

But respondent insists, further, that this complaint does not [11, 12] state a cause of action for malicious prosecution. It fails to allege that any judicial proceeding whatever was instituted or prosecuted against the plaintiff, and, naturally enough, fails to allege that the proceeding terminated favorably to plaintiff before the commencement of the present action. Counsel for appellant reply, however, that these necessary allegations omitted from the complaint were supplied by the defendant's answer. That one pleading may provide a necessary allegation omitted from an adversary pleading is the rule at common law (1 Chitty on Pleading, p. 703), and is now recognized generally as in effect in all states proceeding under the code system (1 Sutherland's Code Pleading, Practice and Forms, sec. 361; Bliss on Code Pleading, 3d ed., sec. 437; 31 Cyc. 714; Pomeroy's Code Remedies, sec. 579). In an early case this court declared that "a defective complaint may be cured when the material fact omitted therefrom has been supplied by the answer." (*Hershfield & Bro. v. Aiken*, 3 Mont. 442.) The same rule has been repeatedly or specifically recognized in each of the following cases: *Murphy v. Phelps*, 12 Mont. 531, 31 Pac. 64; *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; *Lynch v. Bechtel*, 19 Mont. 548, 48 Pac. 1112; *Crowder v. McDonnell*, 21 Mont. 367, 54 Pac. 43; *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201; *Grogan v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007; *Harmon v. Fox*, 31 Mont. 324, 78 Pac. 517; and *Mantle v. White*, 47 Mont. 234, 132 Pac. 22. The rule was applied in *Wall v. Toomey*, 52 Conn. 35, in an action for malicious prosecution. The plaintiff there failed to allege that the proceeding of which he complained had terminated, and this would have been held fatal but for the fact that the omission was supplied by an allegation in the answer.

It will be observed from the statement of the contents of the answer above that defendant distinctly alleges that he caused a criminal prosecution to be instituted against Stephens. He describes the offense, gives the date, the name of the court, and the particular steps taken. This is a sufficient statement that a judicial proceeding was commenced. (13 Ency. Pl. & Pr. 428; *Runk v. San Diego Flume Co.*, 5 Cal. (Unrep.) 251, 43 Pac. 518.) He further alleges that on May 15, 1911, Stephens was, by an order of the district court, discharged from custody and from prosecution on said charge. And this sufficiently discloses that the proceeding had terminated favorably to Stephens. (*McIntosh v. Wales* (Wyo.), 134 Pac. 274; Newell on Malicious Prosecution, p. 332 *et seq.*; *Carpenter v. Nutter*, 127 Cal. 61, 59 Pac. 301; 13 Ency. Pl. & Pr. 444.) The essential allegations omitted from the complaint are thus furnished by the answer. But our determination that these affirmative allegations do not constitute new matter—that they might have been omitted altogether without impairing the efficiency of the answer—is not equivalent to holding that the allegations are immaterial. The facts stated are very material, but their statement was not essential to the defense. However, so long as the defendant volunteered them, he is bound by his statement. The reason of the rule which permits one pleading to be aided by another was concisely stated in an early Massachusetts case, as follows: “When the defendant chooses to understand the plaintiff’s count to contain all the facts essential to his liability, and in his plea sets out and answers those which have been omitted in the count, so that the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the court that all the material facts were in issue, the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy.” (*Slack v. Lyon*, 9 Pick. (Mass.) 62.)

It does not seem consonant with reason, with our present theories of justice, or of the part which courts are to play in its administration, to say that though defendant asserts these facts

to be true, he should not be bound by them, merely because, if he had chosen to do so, he could have omitted any reference to them. Though these allegations do not constitute new matter within the meaning of those words as used in our Civil Practice Act, they are binding upon the defendant as admissions, and supply the necessary facts omitted from the complaint. This is in effect the holding of the supreme court of Connecticut in *Wall v. Toomey* above, and the court of appeals of Kansas in a case whose facts are somewhat similar to those before us. (*Arkansas City Bank v. McDowell*, 7 Kan. App. 568, 52 Pac. 56.)

It is fairly inferable from the record that, in passing upon [13] the motion to exclude evidence, the attention of the trial court was not directed to the allegations of the answer which cure the defects in the complaint, and that no opportunity was afforded for a decision upon the precise question now before us; but our duty extends to a review of the judgment, and if it is erroneous, we cannot say that it is rendered errorless by the failure of counsel to press upon the trial court the same view now urged upon us.

Since issues are presented by the pleadings, the action for malicious prosecution should have been tried upon the merits.

The judgment upon the first and second causes of action is affirmed. The judgment as to the third cause of action only is reversed, and that cause of action is remanded for further proceedings not inconsistent with the views herein expressed. Each party will pay his own costs of this appeal.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**BROWN, APPELLANT, v. INDEPENDENT PUBLISHING CO.,
RESPONDENT.**

(No. 3,300.)

(Submitted November 17, 1913. Decided January 9, 1914.)

[138 Pac. 258.]

Libel—Defense—Pleading—Special Damages—When Publication Libelous Per Se—Innuendo—Construction of Language—Complaint—Insufficiency.

Libel—Defense—Illegal Business—Wrestling.

1. Where an alleged libel is in respect to an unlawful business carried on by plaintiff, such as that pursued by a professional wrestler, contrary to the provisions of section 8576, Revised Codes, he cannot maintain the action for the purpose of recovering damages for injury to his business.

Same—Pleading—Special Damages.

2. If a publication is not libelous *per se*, damages are not recoverable unless they are alleged specially.

[As to what is an excessive verdict in an action for libel, see note in Ann. Cas. 1913B, 700.]

Same—Innuendo—Surplusage.

3. If a publication is not libelous *per se*, it cannot be made so by innuendo.

[As to evidence sufficient to support innuendo, see note in 53 Am. St. Rep. 698.]

Same—Construction of Language—Publication Libelous *per se*.

4. In determining whether language complained of is libelous *per se*, it must be considered in its relation to the entire article in which it appears; and to warrant the conclusion that it is of such character, the words must be susceptible of but one meaning, viz.: that from its publication pecuniary loss to plaintiff necessarily must, or presumably did, follow as its proximate consequence.

[Newspaper libel is the subject of a note in 15 Am. St. Rep. 333. As to what words are actionable *per se*, see note in 116 Am. St. Rep. 802.]

Same—Case at Bar—Complaint—Insufficiency.

5. *Held*, that the publication of an article containing the words: "S. [a professional wrestler] refused to pay room rent," was not libelous *per se*; hence, in the absence of an allegation specially pleading facts showing pecuniary loss because of the publication of such words, his complaint did not state a cause of action for libel.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

ACTION by T. M. Brown, *alias* Tom Sontag, against the Independent Publishing Company, to recover damages on account

of certain libelous statements in its newspaper. From a judgment for defendant, plaintiff appeals. Affirmed.

Mr. E. A. Carleton, for Appellant, submitted a brief and argued the cause orally.

All that section 3602, Revised Codes, requires, and all that the decisions under similar statutes hold is necessary, is that the publication be false and unprivileged and that it results in injury, in the manner pointed out in the statute, or that the false and unprivileged publication "has a tendency to injure him in his occupation." All these matters are alleged in the complaint. If a cause of action is not stated in this complaint, then a newspaper, simply because it is a newspaper, can say anything about anybody, no matter how false the publication may be or how injurious. The statute defines the law of libel of this state, and so long as the pleader brings himself within its terms, the court cannot properly sustain a demurrer to the complaint upon the ground that a cause of action is not stated. (*Lick v. Owen*, 47 Cal. 252; *Tonini v. Cevasco*, 114 Cal. 266, 46 Pac. 103; 18 Am. & Eng. Ency. of Law, 2d ed., 916; Newell on Defamation, Slander and Libel, 2d ed., p. 92.) If the publication imputes a want or unwillingness to pay debts, it is libelous *per se*. (25 Cyc. 258.) Likewise it is libelous *per se* if it is false and has a tendency to injure plaintiff's business. (25 Cyc. 505.) In the case of *Muetze v. Tuteur*, 77 Wis. 236, 20 Am. St. Rep. 115, 9 L. R. A. 86, 46 N. W. 123, it was held that it was libelous *per se* to send an envelope on which is printed the business card of an association the purpose of which was stated to be "for collecting bad debts."

Messrs. Day & Mapes, for Respondent, submitted a brief; *Mr. E. C. Day* argued the cause orally.

Giving to the language of the article in question its natural interpretation, the reader could only gain from this statement the information that the wrestling match or exhibition given at Deer Lodge was not a financial success, and that the wrestler

had left town without paying his room rent. A mere charge that a person, not a merchant or tradesman, has failed or refused to pay a bill, is not libelous *per se*. (*Nichols v. Daily Reporter Co.*, 30 Utah, 74, 116 Am. St. Rep. 796, 8 Ann. Cas. 841, 3 L. R. A. (n. s.) 339, 83 Pac. 573; *Denney v. Northwestern Credit Assn.*, 55 Wash. 331, 104 Pac. 769.) On the face of the pleadings, then, no cause of action is set forth, based upon words actionable *per se*.

The plaintiff, however, has attempted to cure this objection by his innuendo that the defendant meant by the statement "that the plaintiff had defrauded his landlord of his room rent." The purpose of an innuendo is to explain words the meaning of which is not apparent on the face of the article. It cannot add to or take from the interpretation which the ordinary reader would give to such words, unless the words were used in some special connection in which they would not be readily understood by the ordinary reader who had no knowledge of the circumstances giving rise to the special interpretation. In this case the words are used in their natural sense, and the innuendo can add nothing to them. Nor can it take away from them the effect of the explanatory words contained in the second paragraph of the article, to the effect that the receipts of the exhibition had not been sufficient to defray the expenses of what might be termed the expedition of the champion welterweight wrestler of Missoula and his company from Helena to Deer Lodge.

The pleader seeks to cure these defects in his complaint by pleading special damages. But his pleading of special damages is no more effective than his innuendo, for the reason that he alleges no facts from which the special damages are to arise. His allegations of injury to his business are as general in character, though oft repeated, as it is possible for them to be, and do not in any manner comply with the requirements of the rule which has been laid down by this court with reference to such allegations. (*Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289.)

If, however, the plaintiff has been engaged in the business as alleged in his complaint, and has built up a reputation for the

management of such affairs, he has been engaged in an unlawful pursuit, for which he is punishable under the laws of the state. (Rev. Codes, sec. 8576.) No words spoken of him in connection with this business can be held to be libelous, and the unlawful character of his business is a sufficient ground for denying him relief. (*Johnson v. Simonton*, 43 Cal. 242.)

HON. ALBERT P. STARK, Judge of the Sixth Judicial District, sitting in place of MR. JUSTICE SANNER, disqualified, delivered the opinion of the court.

This is an action brought by the plaintiff against the defendant, publisher of the "Helena Daily Independent," to recover damages alleged to have been sustained by him on account of the publication in said newspaper of two alleged libels.

In the first of the two causes of action set out in the amended complaint the plaintiff alleges that at all times therein mentioned he was, and still is, commonly known and called by the name of "Tom Sontag," under which said name he advertises and does business, and that said name is his business and stage name; that the business of plaintiff was, and is, that of a professional wrestler; that he has been giving wrestling matches throughout the state of Montana and elsewhere, for the profit or money to be made for himself out of the same, and that he has devoted all of his time to such business; that in such wrestling matches and exhibitions he would wrestle and engage in wrestling contests for the rewards and profits that he might derive thereby; that in carrying on said business it was necessary to advertise, and the plaintiff did advertise, such matches and exhibitions extensively in the public press, and by means thereof he had become well and favorably known to the general public, and that his success in said business has been to a very great extent due to the good reputation which plaintiff has always borne as an honorable man, and his reputation for honest and square dealing with the public; that plaintiff has always borne a good name and reputation for honesty and square dealing among all people where he has stopped and with whom he has come in contact,

and that until the time of the publication of the article complained of has never been guilty of any base or immoral conduct and has never refused to pay his hotel bills, room rent or other bills. It is then alleged that on May 28, 1912, the defendant published in said newspaper the following article:

"Tom Sontag is Under Arrest.

"Word from Sheriff of Powell County Prompts Chief Flannery to Jail Wrestler.

"By request of Sheriff Joseph Neville, of Powell county, Tom Sontag [meaning the plaintiff], the welterweight champion wrestler of Missoula, who managed an athletic program in which he took part at the Family Theatre Saturday night, was arrested at noon yesterday by Policeman Fred Mundt. The charge is malicious mischief and according to deputy sheriff James Mullin who came over from Deer Lodge on No. 6 this morning to take the wrestler back, Sontag refused to pay room rent when he was there but a short time ago. On returning from Deer Lodge, Sontag, as well as those who accompanied him from Helena, said they had but a \$13 house at Deer Lodge, and it is the opinion of many of the local fans that the wrestler merely ran short of funds."

The particular portion complained of and alleged to be libelous is the statement, "Sontag refused to pay room rent when he was there but a short time ago." By innuendo, it is alleged that by said statement the defendant meant, "that plaintiff had defrauded his landlord of his room rent." It is further alleged that by reason of said publication, which was false and malicious, plaintiff is greatly prejudiced, discredited and injured in his good name, fame, credit and reputation, and is held up and brought into and exposed to public infamy, disgrace, contempt, hatred and ridicule, and by means of the writing or publishing of said libel as aforesaid, the peace and happiness of the plaintiff has been greatly disturbed, and he has suffered anxiety and distress of mind on account thereof, and that his said business has been seriously interfered with, damaged and injured, and that his credit has been greatly injured in consequence thereof.

In the second cause of action the allegations are similar to those of the first, except that the publication complained of was made on May 29, 1912, and is an article apparently published at the instance of the plaintiff for the purpose of enabling him to deny the charge contained in the first publication, which he alleged to be untrue.

To this amended complaint the defendant filed a general demurrer, which was sustained by the Court. The plaintiff elected to stand upon his amended complaint, and judgment was thereupon rendered in favor of the defendant for its costs, from which judgment this appeal is prosecuted. The only question presented for consideration is whether the amended complaint states a cause of action.

In so far as the plaintiff seeks to show that the alleged libelous [1] publications had a tendency to injure him in his occupation, it is sufficient to say that under the provisions of section 8576, Revised Codes, any person who engages in, instigates, encourages or promotes as principal, aid, second, umpire, or otherwise, any wrestling match, is guilty of a misdemeanor, and that "where an alleged libel is only in respect to an unlawful business carried on by plaintiff, the action cannot be maintained. The illegality of the business is an answer to the complaint." (*Johnson v. Simonton*, 43 Cal. 242; 25 Cyc. 329.)

Eliminating from consideration, as mere surplusage, all that portion of the pleading in question relating to the business of the plaintiff and the alleged damage thereto, there is left in the first cause of action the published statement: "Sontag refused to pay room rent when he was there but a short time ago." [2, 3] By innuendo it is alleged that the defendant meant thereby that the plaintiff had defrauded his landlord of his room rent. If the language employed is not libelous *per se*, no cause of action is stated; for it is the general rule that unless the publication is libelous *per se*, special damages must be alleged (*Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289), and there is not any allegation of special damages in this complaint. And the innuendo cannot change the character of the publication. If it is not libel-

ous *per se*, it cannot be made so by innuendo. (25 Cyc. 450.)

[4] In determining whether the language complained of is libelous *per se* it must be construed in its relation to the entire article in which it appears (*Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 3 Ann. Cas. 546, 78 Pac. 215; 25 Cyc. 357), and the entire printed statement must be viewed by the court as a stranger might look at it, without the aid of special knowledge possessed by the parties concerned. (*Denney v. Northwestern Credit Assn.*, 55 Wash. 331, 104 Pac. 769.)

In the early case of *Stone v. Cooper*, 2 Denio (N. Y.), 293, Chancellor Walsworth said that to constitute published matter concerning one libelous *per se*, "the nature of the charge itself must be such that the court can legally presume he has been degraded in the estimation of his acquaintances or of the public, or has suffered some other loss either in his property, character or business, or in his domestic or social relations, in consequence of the publication of such charge." This language has been cited with approval by courts and text-writers generally to the present day and constitutes as precise a test as any known to the law of libel. (*Tillson v. Robbins*, 68 Me. 295, 28 Am. Rep. 50; *Herringer v. Ingberg*, 91 Minn. 71, 97 N. W. 460; *Goldberger v. Philadelphia Grocer Pub. Co.*, 42 Fed. 42.)

In order for a court to legally presume that published words will expose the person at whom they are aimed to hatred, contempt, ridicule or obloquy, or cause him to be shunned or avoided, such words, as they are used, must be susceptible of but one meaning, and that the one which *proprio vigore* leads to the injurious consequences.

Having arrived at the conclusion that all references in the amended complaint to the plaintiff's business or occupation, as well as the innuendo pleaded, must be treated as mere surplusage, [5] we have left the published statement: "Sontag refused to pay room rent." The case then resolves itself into the simple proposition of whether the writing and publication of this statement concerning one who is not engaged in any legitimate business is such an accusation against his good name, fame and

reputation as will necessarily "expose him to hatred, contempt, ridicule or obloquy, or cause him to be shunned or avoided" (Rev. Codes, sec. 3602), to the extent that the court can say, as matter of law, that from its publication pecuniary loss to the plaintiff necessarily must, or presumably did, follow as its proximate consequence, and that therefore it would not be necessary for him to allege such damages in order to recover. The decided cases, a large number of which are cited in *Nicholas v. Daily Reporter Co.*, 30 Utah, 74, 116 Am. St. Rep. 796, 8 Ann. Cas. 841, 83 Pac. 573, clearly negative the proposition.

The article does not impute to the plaintiff an unwillingness to pay any just debt or obligation, but only a refusal to pay a particular charge made against him, and this he might properly do under any code of law or morals if the charge was excessive or had not been incurred. If the publication of this statement did, as a matter of fact, occasion pecuniary loss to the plaintiff, it was incumbent upon him to specially plead the facts showing such loss and damage, and, having failed to do so, the first count of the amended complaint does not state a cause of action. The same reasoning and conclusion will apply to the second cause of action.

From the foregoing it follows that the order of the trial court in sustaining the demurrer to the amended complaint was correct and should be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STATE, RESPONDENT, v. CHEVIGNY, APPELLANT.

(No. 3,336.)

(Submitted January 5, 1914. Decided January 16, 1914.)

[138 Pac. 257.]

Criminal Law — Arson—Information—Irregularities—Jurisdiction — Waiver — Circumstantial Evidence — Sufficiency—Instruction—Principal and Accessories.

Criminal Law—Information—Irregularities—Jurisdiction—Waiver.

1. The objection that an information was filed, without leave of court, more than thirty days after the committing magistrate had lodged the papers with the clerk of the district court, must be made in writing and before demurrer or plea, or it is waived; hence, where defendant did not raise such an objection to the jurisdiction of the court until after plea and then orally, he was not in a position to complain of the action of the court in overruling the objection.

Same—Arson—Circumstantial Evidence—Sufficiency.

2. Evidence, entirely circumstantial in character, in a prosecution for arson, *held* sufficient—under the rule that where conviction is sought upon circumstantial evidence, the circumstances proved must be consistent with each other and with the hypothesis of defendant's guilt, and at the same time inconsistent with any rational hypothesis other than that of his guilt—to warrant a finding that defendant, either in person or through the agency of another, set fire to a rooming-house in the night-time.

[Circumstantial evidence is considered in the notes in 62 Am. Dec. 179; 97 Am. St. Rep. 771.]

Same—Instructions—Principals and Accessories.

3. Where in a prosecution for arson there was some testimony, though not of a very convincing nature, that defendant procured someone to set the fire, the giving of instructions embodying the provisions of sections 8119 and 9167, Revised Codes, abolishing the distinction between principals and accessories, declaring all persons concerned in the commission of crime principals, *etc.*, and the refusal of others directing the jury to find for the defendant unless they were justified beyond a reasonable doubt that he was present personally and set the fire himself, were proper.

Appeal from District Court, Missoula County; Frank C. Webster, Judge.

J. L. CHEVIGNY was convicted of the crime of arson and appeals from the judgment and an order denying his motion for a new trial. Affirmed.

Cause submitted on briefs of counsel.

Mr. W. L. Murphy, for Appellant.

Mr. D. M. Kelly, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Early in the morning of October 25, 1911, a building occupied as a lodging-house, in the city of Missoula, was destroyed by fire. On November 29 the defendant was, after examination by a justice of the peace, held under bail to answer in the district court on the charge of arson for setting fire to the building. The justice transmitted the transcript of the testimony heard by him and all the papers in connection with the case to the clerk of the district court, and they were filed by the latter on December 5. On January 5, 1912, the county attorney filed an information charging the defendant with the crime of arson. Leave of court for this purpose was not asked nor granted. Thereafter the defendant appeared with his counsel and, upon arraignment, waived the reading of the information and at once entered a plea of not guilty. A trial resulted in a verdict of guilty of arson in the first degree. From the judgment entered thereon and an order denying his motion for a new trial the defendant has appealed. Counsel contends that the judgment should be reversed, for that the district court was without jurisdiction to try the defendant upon the information; that the verdict is contrary to the evidence; and that the court committed error in submitting instructions to the jury.

1. The jurisdiction of the court is challenged on the ground that the information was filed without leave of court more than thirty days after the testimony and papers in the case had been [1] filed with the clerk. Under the statute (Rev. Codes, sec. 9105), when the defendant has been examined and committed or held to bail, the county attorney must file an information

within thirty days after the complaint, warrant and testimony have been delivered to the proper district court, or, when there has been no examination, within thirty days after leave granted by the court. He is subject to punishment for contempt and also to prosecution for neglect of duty if he fails to do so, unless he is excused by the court as provided in section 9107. Under section 9193 the court must, at the time of arraignment, on motion set the information aside if leave to file it has not been granted by the court or the defendant has not been committed or held to bail by a magistrate. In order to invoke the power of the court in this behalf, however, the motion must be in writing, subscribed by the defendant or his counsel, and must specify the particular ground of objection. Furthermore, the motion must be made before demurrer or plea, or the objection is waived. (Sec. 9194.) The requirements found in sections 9105, 9107 and 9193 are mandatory. The purpose of them is to spur the county attorney to prompt attention to his duty and to compel him to exercise the extensive powers of his office, so far as they relate to the prosecution of criminal offenses, not arbitrarily but subject to the control of the court and in subordination to established rules. Nevertheless, the observance or nonobservance by him of the rules thus prescribed does not affect the jurisdiction of the court nor the substantial merits of the particular case, but has to do merely with the regularity of previous proceedings. The defendant may insist that they be observed, but he need not do so. If he does not, the court is authorized and required by section 9194 to proceed upon the assumption that all antecedent requirements have been observed. This section is not less mandatory than are the others, and if the defendant does not invoke it at the proper time and in the way pointed out by it, he will thereafter not be heard to complain. (*State v. Smith*, 12 Mont. 378, 30 Pac. 679; *State v. McCaffery*, 16 Mont. 33, 40 Pac. 63; *State ex rel. Nolan v. Brantly*, 20 Mont. 173, 50 Pac. 410; *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927; *State v. Peterson*, 24 Mont. 81, 60 Pac. 809; *State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044.) Counsel for the defendant sought

to raise the question of jurisdiction by oral objection to the introduction of evidence at the opening of the trial. The objection was properly overruled.

2. The evidence, the narrative transcript of which covers [2] about 800 typewritten pages, is entirely circumstantial in character. It would extend this opinion beyond any reasonable limits to undertake a statement and analysis even of those portions of it which point most strongly to defendant's guilt. It is sufficient to say that while there is much conflict in the statements of the different witnesses touching many of the important incriminating circumstances, presuming, as we must, that these conflicts were resolved by the jury in favor of the state's witnesses, and accepting these statements as true, we think the evidence as a whole meets the requirement of the rule that when a conviction is sought upon circumstantial evidence, the circumstances proved must be consistent with each other and with the hypothesis of defendant's guilt, and at the same time inconsistent with any rational hypothesis other than that of his guilt. (*State v. Suitor*, 43 Mont. 31, Ann. Cas. 1912C, 230, 114 Pac. 112; *State v. Allen*, 34 Mont. 403, 87 Pac. 177; 12 Cyc. 488.) On the theory that the incriminating circumstances which the evidence tends to show all in fact existed as stated by the witnesses, the jury could not well have reached any other conclusion than that the defendant, either in person or through the agency of another, set fire to the building as alleged in the information.

3. Contention is made that prejudicial error was committed by the court in submitting to the jury instructions 3 and 4, and [3] in refusing to submit offered instructions 12, 13 and 16. Instructions 3 and 4 are, respectively, copies of sections 8119 and 9167 of the Revised Codes. The former declares principals all persons concerned in the commission of a crime, whether they directly commit the act constituting it or aid and abet in its commission, or, not being present, have advised and encouraged its commission. The latter abolishes the distinction between an accessory before the fact and a principal, and between prin-

cipals in the first and second degree, and declares that all persons concerned in the commission of a felony by aiding and abetting, though not present, must be prosecuted as principals. By offered instructions 12, 13 and 16, the court was requested to direct the jury that they could not convict the defendant unless they should be satisfied beyond a reasonable doubt that he was personally present and set the fire that destroyed the building. The criticism made of instructions 3 and 4 is that there is no evidence to which they could apply, and hence that, though they state correct principles of law, they must have confused and misled the jury to the prejudice of the defendant. The evidence tending to show that the defendant procured the fire to be set by some other person is not very strong or convincing; nevertheless there was evidence tending to show that this may have been the fact. Hence the court was justified in submitting these instructions. Such being the condition of the evidence, it is clear also that instructions 12, 13 and 16 were properly refused.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

BUTTE WATER CO., RESPONDENT, v. CITY OF BUTTE,
APPELLANT.

(No. 3,321.)

(Submitted November 22, 1913. Decided January 16, 1914.)

[138 Pac. 195.]

Contracts — Interpretation—When Permissible—Intent—Cities and Towns—Water Supply—Municipal Purposes—Practical Interpretation by Parties—Effect—Water Mains—Extension—Liability for Cost.

Contracts—Interpretation—When not Permissible.

1. Where the language employed in a written contract is so clear and unambiguous that it cannot be misunderstood, it is not open to interpretation.

Contracts—Interpretation—Cities and Towns—Water Supply—Municipal Purposes.

2. *Held*, that a contract between a city and a water company, under the provisions of one paragraph of which, to the effect that the company would at a stipulated rate per hydrant supply water "necessary for fire and general municipal purposes," the city contended for water for sprinkling and other municipal purposes without additional cost, was not so free from ambiguity as to exclude interpretation, where from language in a succeeding paragraph an inference was permissible that by it the service mentioned in the former was limited to fire hydrant service, and where under another clause the company was required to furnish water free of charge for certain enumerated purposes.

Same—Practical Interpretation by Parties—Effect.

3. Where the parties to a contract of doubtful or ambiguous meaning have placed a practical interpretation upon it for a number of years, it is one of the best indications of their true intent.

Same—Cities and Towns—Water Mains—Extension—Liability for Expenses.

4. Under a contract between a city and a water company providing that the latter should furnish and keep supplied with water all hydrants installed in excess of the then existing hydrants, that all such hydrants should be located as the fire marshal directed and kept in good repair by the company ready for use for fire purposes, and that the city should have the right to order the water mains extended upon any street, the city was not liable for materials and labor in setting a new hydrant and laying a water main.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by the Butte Water Company against the city of Butte. From a judgment for plaintiff, defendant appeals. Remanded, with directions to modify judgment, the judgment as so modified to stand affirmed.

Messrs. Alexander Mackel, W. F. Davis, N. A. Roterling and Mr. Lowndes Maury, of Counsel, for Appellant, submitted a brief and one replying to that of Respondent; Mr. Mackel and Mr. Maury argued the cause orally.

There can be no difference between "all general municipal purposes" and "all public purposes of the city." There is no material difference between a phrase "all general municipal purposes" and "all ordinary or customary municipal purposes." Sprinkling the streets has been held to be a public purpose of a municipality, and this is the same as a general municipal purpose. (*Maydwell v. City of Louisville*, 116 Ky. 885, 105 Am.

St. Rep. 245, 63 L. R. A. 655, 76 S. W. 1091; *Savage v. Salem*, 23 Or. 381, 37 Am. St. Rep. 688, 24 L. R. A. 787, 31 Pac. 832.) If any of these waters supplied were not for general municipal purposes, then the city was not liable to pay for them at all, because the city can use its money only in the carrying out of general municipal purposes. (McQuillin on Municipal Corporations, sec. 2165.)

We admit that where a private corporation, through its officers, makes voluntary payments under the assumption that a contract is of a different nature from its true form, then such payments cannot be recovered back, nor can they be set off to subsequently accruing debts; but the rule is not the same with reference to municipal corporations or any other public concern. The exception for which we contend is well discussed in the following cases: *Ellis v. Board of State Auditors*, 107 Mich. 528, 65 N. W. 577; *State v. Young*, 134 Iowa, 505, 13 Ann. Cas. 345, 110 N. W. 292; *Allegheny County v. Grier*, 179 Pa. 639, 36 Atl. 353; *State ex rel. Beck v. Washoe County Commrs.*, 14 Nev. 66; *Union County v. Hyde*, 26 Or. 24, 37 Pac. 76. And it is proper to set off such payments. (*Dew v. Parsons* (K. B.), 2 Barn & Ald. 562; *Commonwealth v. Field*, 84 Va. 26, 3 S. E. 882; *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71; *Ward v. Town of Barnum*, 10 Colo. App. 496, 52 Pac. 412; 30 Cyc. 1301.) There is no basic cause why a man should not get back by law a payment which he has made voluntarily and which he did not, under contract or in equity or law, have to make. The entire doctrine is founded on one of expediency and policy; a doctrine that there should be repose. Nothing more can be said for the advantage of the courts holding to such a doctrine. In the instant case there is, if the court holds the city foreclosed by the voluntary payments, a breaking in on two other basic principles of justice and equity: (1) That the well-being of the state is the highest law; (2) that the city officers were not dealing with their own, but with trust funds. There can be no doubt as to the law under that contract. It could not be a mistake of law on the part of either concern. It was a mutual mistake of fact.

Where such is the case, the parties can be put in the same position in which they were without loss to either, and the rule is, that under such a situation the money can be gotten back without regard to the exception in favor of public corporations. And it is no defense, where the money is paid under a mistake of fact, to an action for its recovery that the mistake arose through the payor's negligence if such negligence caused no harm to the payee. (22 Am. & Eng. Ency. of Law, 2d ed., 624, and note.)

“Evidence to add a parol condition to a grant repugnant to its legal effect cannot be received without proving fraud.” (*Beers v. Beers*, 22 Mich. 42.) “Parol evidence of what the parties understood and as to what they would do in pursuance of the agreement is not admissible where the agreement shows the true construction.” (*Miller v. Butterfield*, 79 Cal. 62, 21 Pac. 543, 17 Morr. Min. Rep. 222; *Bryan v. Idaho Quartz Min. Co.*, 73 Cal. 249, 14 Pac. 859.) Proof of declarations made antecedent, coexistent or subsequent is not competent to vary the terms of a sealed instrument, and may be rejected at any time before the retirement of the jury. (*Mott v. Richtmyer*, 57 N. Y. 49; *Hale v. Handy*, 26 N. H. 206.) One of the leading cases on the subject and to the effect that subsequent conduct of the parties cannot vary the terms of a written contract is the case of *Giles v. Comstock*, 4 N. Y. 270, 53 Am. Dec. 374. The last case above was followed in *Taft v. Schwamb*, 80 Ill. 289, and was cited also to the effect that an express contract prevails over a custom to waive its provisions. See, also, *Coal Creek Min. etc. Co. v. Tennessee Coal etc. Co.*, 106 Tenn. 651, 62 S. W. 162, where it is held that an acceptance of a less amount than due does not waive the right to the full amount due by the terms of the agreement. The latter portion of the decision is exactly in point, if we think of water instead of money. The acceptance by the city of a less amount of water due under the contract did not waive the right to the full amount of water due by the terms of the contract. The construction which parties place upon a contract is ineffective in the absence of ambiguity. The fact that a party to a contract pays interest for three years,

which on a proper and obvious construction of the contract he was not required to do, should have no weight in the construction of the contract. (*Garard v. Monongahela College*, 114 Pa. 237, 6 Atl. 761; 17 Am. & Eng. Ency. of Law, 2d ed., 25.)

Mr. L. O. Erons and **Mr. John E. Corette**, for Respondent, submitted a brief and one in reply to that of Appellant; **Mr. Erons** argued the cause orally.

Our position is that the contract of December 31, 1907, required the furnishing by the water company of water free for the purposes for which it has been furnished the city at all times, to-wit, for flushing the sewers and for use in the public buildings at Butte, and for no other purposes, and that the general clause found in the second paragraph is simply the usual clause found in such contracts, by which the company, a quasi-public corporation, agreed to furnish, during the period there provided, a general water supply for the city and its inhabitants, and to furnish water for certain municipal purposes, as therein specified, the fire-hydrant water to be paid for at the rate there specified, and the water for flushing the sewers and for the public buildings to be furnished free, as therein specifically provided. The fact that one of the parties to the contract is a municipal corporation does not in any manner change the rules to be resorted to in interpreting its meaning. (Sec. 5024, Rev. Codes; *Vincennes v. Citizens' Gas Light & Coke Co.*, 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573.)

To construe this contract properly and rationally, it must be taken in its entirety and effect given to every portion of it, if by so doing a reasonable result can be reached; and only by construing the general clause in question as it was intended to be construed—that is, in connection with the specific clauses therein contained—can the whole contract be construed, meaning given to every part of it, and use made of all of its language in determining the intent of the parties. (*Animas Con. Ditch Co. v. Smallwood*, 22 Colo. App. 476, 125 Pac. 594; *Lewis' Sutherland on Statutory Construction*, sec. 380.) Again, in

choosing between the different interpretations claimed for the contract, the court is required to select the one which will give to each of the parties a fair, reasonable and equitable agreement, and a result must be avoided, if possible, which would bind the parties to an arrangement which a reasonable man of ordinary intelligence and business experience would not be presumed to have entered into. (Bishop on Contracts, sec. 400; Page on Contracts, sec. 1121; Lawson on Contracts, sec. 389; *Caine v. Hagenbarth*, 37 Utah, 69, 106 Pac. 945; *Messer v. Hibernia Sav. etc. Soc.*, 149 Cal. 122, 84 Pac. 835.) Where the language of a contract leaves the meaning at all doubtful, it is customary for the court to place itself in the position of the parties who made it as nearly as can be done, by receiving evidence of the surrounding facts and circumstances, the nature of the subject matter, the relation of the parties to the contract, the object sought to be accomplished, etc. (Sec. 5036, Rev. Codes; Page on Contracts, sec. 1123; *State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.) Where the parties to a contract of doubtful or ambiguous meaning have placed upon it a practical construction, and have by their acts under it shown what they considered the contract to mean, and especially where this practical construction is shown to have been followed for a long period of years, the courts invariably follow such practical construction and hold it to be controlling. (Page on Contracts, sec. 1126; 9 Cyc., p. 588; *District of Columbia v. Gallagher*, 124 U. S. 505, 31 L. Ed. 526, 8 Sup. Ct. Rep. 585; *Thomas v. Cincinnati etc. Ry. Co.*, 81 Fed. 911; *City of Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 19 L. Ed. 594; *Hill v. City of Duluth*, 57 Minn. 231, 58 N. W. 992; *St. Louis Gas Light Co. v. City of St. Louis*, 46 Mo. 121; *School District of South Omaha v. Davis*, 76 Neb. 612, 107 N. W. 842; *Board of Commissioners v. Gibson*, 158 Ind. 471, 63 N. E. 982.) This rule, as to the practical construction of a contract by the parties being controlling, goes even further than a case where the contract may be susceptible in its language to more than one interpretation, and is applied to cases where the practical construction is at

variance with the plain, literal language of the contract. (*District of Columbia v. Gallagher, supra; Amherst Inv. Co. v. Meacham*, 69 Wash. 284, 124 Pac. 682.) The question of the correct interpretation of this contract is also disposed of in favor of the plaintiff by the rule of construction recognized at common law and embodied in section 5038 of the Revised Codes. (See *Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035; *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391; *Jordan v. Dyer*, 34 Vt. 104, 80 Am. Dec. 668; *Snow v. Flannery*, 10 Iowa, 318, 77 Am. Dec. 120; *Chicago Lumber Co. v. Tibble's Mfg. Co.*, 80 Iowa, 369, 45 N. W. 893; *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292; *Kendrick v. Mutual Benefit Life Ins. Co.*, 124 N. C. 315, 70 Am. St. Rep. 592, 32 S. E. 728; *San Jacinto Oil Co. v. Fort Worth L. & P. Co.*, 41 Tex. Civ. 293, 93 S. W. 173; *American Loan & T. Co. v. Toledo S. & S. R. Co.*, 47 Fed. 343.)

The rule of construction prescribed in section 5034, Revised Codes, that the contract is under some circumstances to be taken most strongly against the promisor, while recognized at common law, is also there always regarded as the guide to interpretation of least force of all, and only to be resorted to when all other rules of interpretation have failed. (Lawson on Contracts, sec. 389; 2 Parsons on Contracts, 9th ed., p. 662.)

Where a municipal corporation has general power to contract for a supply of water, or for water, material or labor, and the water or other material or the labor is furnished and accepted and used, the city is liable therefor upon an implied promise, the same as any other party would be, and even where the water or material is furnished under an express contract, which is invalid, the city cannot accept the benefit and then question the executed portion of the contract and decline to pay the reasonable value of the labor or material so accepted. (Dillon on Municipal Corporations, secs. 1538, 1539; *State v. City of Great Falls*, 19 Mont. 518, 49 Pac. 15; *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189; *Higgins v. San Diego Water Co.*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; *Sacramento Co. v. Southern Pac. Co.*, 127 Cal. 217, 59 Pac. 568, 825.)

Where a party has voluntarily, with full knowledge of the facts and without any fraud, duress or extortion, paid money to another, although no legal obligation existed to pay the same, the party paying cannot by direct action or by way of setoff or counterclaim recover back the payments. (30 Cyc. 1298.) While it is contended by counsel that this rule does not apply to a municipal corporation, in the following cases the courts have unhesitatingly applied the rule as against municipal corporations and their officers. (See *Advertiser & T. Co. v. City of Detroit*, 43 Mich. 116, 5 N. W. 72; *Village of Morgan Park v. Knopf*, 199 Ill. 444, 65 N. E. 322; *Dickey Co. v. Hicks*, 14 N. D. 73, 103 N. W. 423; *Schell City v. Rumsey Mfg. Co.*, 39 Mo. App. 264; *People v. Foster*, 133 Ill. 496, 23 N. E. 615; *Cox v. Mayor etc.*, 103 N. Y. 519, 9 N. E. 48; *Snelson v. State*, 16 Ind. 29; *Supervisors v. Briggs*, 2 Denio (N. Y.), 26.)

MR. JUSTICE SANNER delivered the opinion of the court.

The pleadings in this case unfold with progressive elaboration. In all they occupy 169 pages of the transcript, and to produce them here, to present even an abstract of their essentials, would take so much space and serve such little purpose that a bare statement of the ultimate issue must suffice.

The respondent water company (plaintiff below) recovered judgment against the appellant, city of Butte, for \$11,445 made up as follows: \$8,464.50, with interest, for certain fire-hydrant water furnished the city in the months of July, August, September and October, 1911, under a written contract dated December 31, 1907; \$1,524.85, with interest, as the reasonable value of certain water for street sprinkling, furnished the city in July, August, September, October, November and December, 1911; and \$416.40, with interest, as the reasonable value of certain water furnished the city in July, August, September, October, November and December, 1911, at its corral, crematory and crematory residence; and of labor and material furnished in setting a water meter at the crematory in July, 1911, setting two hydrants in September, 1911, and laying a certain water

main in October, 1911. Payment was resisted by the city on the grounds that all the items of charge, except that of fire-hydrant service, were the due of the city without other payment than the fire-hydrant rates under the contract of December 31, 1907, and that the charge for fire-hydrant service was more than offset by sums paid by the city under mistake of its officers to the company for sprinkling, corral and crematory water furnished after January 1, 1908, and before August 1, 1911.

The material paragraphs of the contract in question (which we have numbered for convenient reference) are as follows:

“(2) That the party of the first part (the water company) for and in consideration of the covenants and agreements hereinafter contained, and to be kept and performed by the said party of the second part (the city), agrees that it will furnish to the said party of the second part, all hydrant and water supply necessary for fire and general municipal purposes for a period of ten years from and after January 1, 1908, and ending on the 31st day of December, 1917.

“(3) The said party of the first part further agrees that it will furnish to the said city of Butte, during the term of this contract, and keep supplied with water four hundred and fifty-two (452) fire hydrants, as the same are now placed at different points within the city of Butte, and that it will keep at all times said fire hydrants in good repair and ready for use for fire purposes for the sum of twenty-two thousand six hundred dollars (\$22,600) per year, being \$50 per annum for each of said hydrants.

“(4) It is further agreed upon the part of the said first party that it will furnish to the said city of Butte, and keep supplied with water all hydrants installed by said city in excess of the said four hundred and fifty-two (452) hydrants at the rate of \$50 per annum for each hydrant, and that each and all of such hydrants shall be placed and located as the fire committee and fire marshal shall direct, and that the said party of the first part will at all times keep the same in good repair ready for use for fire purposes.

“(5) It is further agreed upon the part of the party of the first part that it will furnish to the said city during the term of this contract all water that shall be required by the said city for flushing the public sewers, and for the use of the public buildings in the said city free of charge, provided, however, that the said city provide outlets through which such water shall be furnished, and provided, further, that reasonable rules as to the time of sewer flushing shall be agreed upon between the city and the company, so as not to impair the efficiency of the system for fire protection. * * *

“(7) The said second party, in consideration of the agreements hereinbefore contained to be kept and performed by said first party, agrees that it will pay to said first party the sum of \$50 per annum per hydrant, for the period of ten years from and after January 1, 1908, in equal monthly installments, and the further sum of \$50 per annum for each hydrant which may be added under the conditions hereinafter set forth.

“(8) It is further understood and agreed by and between the parties hereto that the said second party shall have the right at any time to order the water mains of the said first party extended upon any street in any part or portion of the said city, during the term of this contract, and that whenever the said second party shall order said mains extended the said second party hereby agrees to and with the said first party to take and use of the said first party at the established rate hereinbefore mentioned, at least one fire hydrant for every city block so ordered to be laid; it being further understood and agreed that in no case shall more than three hydrants be placed for each one thousand feet of such main extensions. * * *

1. According to the appellant, the above contract is so clear [1] that it “conveys but one idea to the mind of the child, the professional man, the ordinary business man, the entire community,” viz., that for the hydrant rental specified therein the water company agreed to furnish to the city “all hydrant and water supply necessary for fire and general municipal purposes for a period of ten years from and after January 1, 1908.”

If this be correct—and to determine its correctness is obviously the first step in the problem before us—then the contract is not open to interpretation (*Frank v. Butte & Boulder M. & L. Co.*, ante, p. 83, 135 Pac. 904; *Quirk v. Rich*, 40 Mont. 552, 107 Pac. 821; *Harris v. Root*, 28 Mont. 159, 72 Pac. 429), and the judgment, in part at least, must fall.

Whether a document is or is not ambiguous is a matter of impression rather than of definition. This is obviously so, because every provision may be as clear and definite as language can make it, yet the result of the whole be doubtful from lack of harmony in its various parts. The language used is to be resorted to in the first instance, but the conclusion to be reached depends, not upon the verbal clarity of the particular sentences or paragraphs, but upon the view to be taken of the contract in its entirety. (*O'Brien v. Miller*, 168 U. S. 287, 42 L. Ed. 469, 18 Sup. Ct. Rep. 140; Page on Contracts, sec. 1112; 9 Cyc. 579.) Recognition of this may be found in all the books upon the subject, culminating in our Code provision that "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Rev. Codes, sec. 5030.) Can it be said, then, that [2] taking the contract as a whole, its meaning is so clear that "he who runs may read"? We think not. Assuming that the language of paragraphs 2 and 7 clearly implies an undertaking on the part of the company to supply the city with all the water necessary for fire and for general municipal purposes in consideration of the hydrant charge, that construction cannot be applied to the contract as a whole, without ignoring the import of the paragraphs numbered 3, 4, and 5. Paragraph 3, for instance, appropriates the consideration named to the fire-hydrant service, and it is a permissible, if not a necessary, inference from the language of this paragraph that the only service agreed to be rendered for the consideration named was the fire-hydrant service; in other words, paragraph 3 may be said to limit the apparent scope of paragraph 2. (*Railton v. Taylor*, 20 R. I. 279, 39 L. R. A. 246, 38 Atl. 980.) Again, paragraph 5

cannot be given any meaning consistent with the idea that the hydrant charge was intended to be in payment of all water that might be supplied to the city for general municipal purposes; on the contrary, its clear implication is that at least some water within the definition of "general municipal purposes" should be free of any charge. Paragraph 5 is a material part of this contract, and it may be reasonably viewed as an incidental or additional inducement to the city for its assent; but it is rendered valueless for this purpose because there was no need to stipulate for water "free of charge" if all the water was to be paid for by the hydrant rates. If, on the other hand, paragraph 5 is an incidental provision for free water, in the nature of an inducement to the city for its assent, then the purposes for which such water should be furnished are specifically enumerated, with the necessary inference that no other water was intended to be free.

We are not unmindful of the provision of our Code that "repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract" (Rev. Codes, sec. 5041); but this itself is a rule of interpretation rather than of construction, and the general intent and purpose of the contract is the very matter that is put in doubt. "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract" (Rev. Codes, sec. 5037); and, granting that the contract before us may be construed so as to cover and include water for sprinkling, corral and crematory purposes, that it need not be so construed is apparent. In such a situation there is ambiguity within the meaning of the law which opens the contract to interpretation by the aid of evidence *aliunde*, so as to give effect to the mutual intention of the parties to it at the time it was made. (Rev. Codes, secs. 5025, 5036; *Lozes v. Segura Sugar Co.*, 52 La. Ann. 1844, 28 South. 249; *Pressed Steel Car Co. v. Eastern Ry. of Minnesota*, 121 Fed. 609, 57 C. C. A. 635; *Uinta Tunnel etc. Co. v. Ajax Gold Min. Co.*, 141 Fed. 563, 73 C. C. A. 35.),

2. The reply alleges in effect that the contract in question was a continuation or renewal of relations which had existed since January, 1893, under successive contracts of the same general character, and containing substantially the same provisions as the one at bar, and that it was formulated and entered into with the understanding and in view of the construction which both parties alike had attached to these prior contracts; that these contracts had never been understood by either the company or the city to require the furnishing of any work, labor or material whatsoever, or any water free of charge except for flushing sewers and for use in the public buildings of the city, but were all understood, construed and acted upon by both the company and the city so as to leave subject to independent arrangement the furnishing of water for sprinkling, corral and crematory purposes and the furnishing of labor and material of the character set forth in the complaint; that during such period separate and independent arrangements did in fact exist, under which the company furnished, and the city voluntarily paid for, all such labor and material and all the water used for sprinkling, corral and crematory purposes; and that from June 1, 1908, up to and including the month of June, 1911, the contract at bar was by both the city and the company understood and acted upon to similar effect. Doubt may be entertained whether the conduct of the parties under the prior contracts could aid in the interpretation of the contract at bar, since they were completed and past transactions; but, in view of the similarity of language employed, it does not seem unreasonable to say that, in the absence of an indication to the contrary, the meaning the parties put upon the language used in the prior contracts was the meaning they attached to it when they used it in the present contract. In any event, the evidence, which is both documentary and oral, establishes without contradiction that the parties did put a common practical interpretation not only upon the prior contracts but also the one at bar for the first three and one-half years of its existence; and the manner in which they interpreted it sustains the conclusion that the intention of the parties when it was made

was to provide for a supply of water for fire protection to be paid for as stipulated, to furnish free water for flushing sewers and for the public buildings, and that water required for other purposes was not deemed within the purview of the contract. It [3] is an ancient and elementary rule that, where parties to a contract of doubtful or ambiguous meaning have placed a practical interpretation upon it, said interpretation is one of the best indications of their true intent. (*Uinta Tunnel etc. Co. v. Ajax Gold Min. Co.*, *supra*; *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C.), 81 Fed. 911; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 19 L. Ed. 594; *City of Vincennes v. Citizens' Gas Light & Coke Co.*, 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573; *Hill v. City of Duluth*, 57 Minn. 231, 58 N. W. 992; *Animas Con. Ditch Co. v. Smallwood*, 22 Colo. App. 476, 125 Pac. 594.) Hence error cannot be imputed to the trial court in so far as the findings and judgment at bar effectuate the intent thus established.

3. But the contract is not subject to interpretation by the parties or by anyone else concerning any matter upon which it clearly speaks. We think this principle was infringed in the [4] award to the respondent of the whole of its fifth cause of action. Included in this cause of action are certain items, to-wit: "Material and labor furnished in setting two-inch hydrant on corner of Montana and Granite streets, of the reasonable value of \$71; material and labor furnished in setting hydrant at corner Broadway and Granite streets, of the reasonable value of \$58.29; material and labor furnished in laying two-inch water main on Oregon avenue, 225 feet north of Gallatin street, to south side of Irvine street, of the reasonable value of \$128.60." As we construe the contract, it is clear, unambiguous and not subject to interpretation touching the duty of the company to furnish fire hydrants and install water mains. In our judgment, paragraphs 4 and 8 clearly impose this duty upon the company. That these items were not of that character or were incurred in aid of purposes not covered by the contract we find nothing in the record to show. We must therefore assume them to have been within the duty imposed upon the company by paragraphs 4 and 8 of the contract,

and no recovery can be had. The total amount, including interest, represented by these items is \$282, and the judgment should be reduced accordingly.

The cause is remanded to the district court, with directions to correct the judgment as above suggested; the judgment when so corrected to stand affirmed.

MR. JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

KAUFMAN, APPELLANT, v. CITY OF BUTTE ET AL.,
RESPONDENTS.

(No. 3,324.)

(Submitted January 6, 1914. Decided January 19, 1914.)

[138 Pac. 770.]

Cities and Towns—Streets—Dedication—Elements Constituting — Acceptance — Evidence—Sufficiency—Injunction—Appeal—Maps—Record.

Injunction—Properly Denied, When.

1. Equitable relief by way of injunction to prevent the removal of a frame structure valued at \$200 from ground claimed by defendant city as a portion of one of its streets, and to which ground plaintiff had no title whatever, was properly denied since an action at law would afford plaintiff complete relief by way of damages.

[As to injunctions against trespassers on real estate, see note in 99 Am. St. Rep. 731.]

Common-law Dedication—Pleadings—Sufficiency.

2. An answer alleging that land in controversy had been for more than ten years regularly laid out, dedicated, and used as a public thoroughfare or street of the city was sufficient to admit proof of a common-law dedication.

Same—Elements Constituting.

3. The essential elements of a common-law dedication of land for street purposes are the owner's offer evidencing his intention to dedicate, and an acceptance by the public.

[As to what constitutes dedication of highway, see note in 57 Am. St. Rep. 749.]

Same—Offer—Sufficiency.

4. The filing of a plat on which an avenue was shown by name, though insufficient to meet the requirements of the statute in that regard, was a sufficient offer to the public of the ground under a com-

mon-law dedication, and, in the absence of evidence to the contrary, indicated the intention of the owners to dedicate the ground to the public for a highway.

[As to dedication by maps and plats, see note in 10 Am. St. Rep. 189.]

Appeal—Maps—Record.

5. Where a map or plat is used on the trial in the district court, it should be incorporated in the record on appeal, with proper references fixing the points adverted to by the witnesses, to the end that the evidence touching it may be intelligible to the appellate court.

Same—Injunction Order—Burden of Showing Error.

6. On appeal from an injunction order, the appellant has the burden of showing that the evidence preponderates against the trial court's findings.

Common-law Dedication—Acceptance by Public—Evidence—Sufficiency.

7. Evidence held insufficient to show such user of a strip of ground as a street by that part of the general public having occasion to use it, as well as sales of lots with reference to such street, as to constitute an acceptance of it by the public as a street under a common-law dedication.

Same—Dedication—Acceptance—Reasonable Time.

8. The acceptance of a common-law dedication must occur within a reasonable time after the offer.

[As to what constitutes dedication and acceptance of public street, see note in 129 Am. St. Rep. 576.]

Same—Negligence of Officers—Effect.

9. The right of a city to the use of a strip of ground as a street dedicated for that purpose cannot be defeated by the negligent or wrongful failure of its officers to prevent the use of a portion of it as a building site.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

SUIT by Louis Kaufman against the city of Butte and its street commissioner. Decree for defendants. Plaintiff appeals from an order denying his motion for a new trial. Affirmed.

Mr. Jesse B. Roote and Mr. A. C. McDaniel, for Appellant, submitted a brief; Mr. Roote argued the cause orally.

The plat of the Central addition was erroneously admitted. It does not disclose the width of Oregon avenue. (Sec. 2031, Fifth Div., Comp. Stats. 1887; *Tilzie v. Haye*, 8 Wash. 187, 35 Pac. 583; *Winnetka v. Prouty*, 107 Ill. 218; *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774; *Coe College v. Cedar Rapids*, 120 Iowa, 541, 95 N. W. 267; *Watson v. Carver*, 27 App. D. C.

555.) Section 2032 provides that a copy of the map or plat "shall be filed in the office of the clerk of the county, and also in the office of the clerk of such city or town, if said town be incorporated." The evidence fails to show that any copy of the plat was filed in the office of the clerk of the city of Butte. (*City of Leadville v. Coronado Min. Co.*, 37 Colo. 234, 86 Pac. 1034.)

Over the objection, the defendants were allowed to introduce evidence tending to show a common-law dedication of the ground covered by the plat, including the ground in controversy. This was objected to because the answer attempted to allege only a statutory dedication, and evidence of no other dedication or title could be introduced. A common-law dedication is an affirmative defense, which, to be available to the defendants, must be pleaded, and the burden of proof is on the defendants. (*Tilzie v. Hays*, *supra*; *Tate v. Sacramento*, 50 Cal. 242; *City of Shreveport v. Drouin*, 41 La. Ann. 867, 6 South. 656; *Miller v. Aracoma*, 30 W. Va. 606, 5 S. E. 148; *Hayward v. Manzer*, 70 Cal. 476, 13 Pac. 141; *Demartini v. San Francisco*, 107 Cal. 402, 40 Pac. 496; *Oglesby v. Santa Barbara*, 119 Cal. 114, 51 Pac. 181; *Village of Benson v. St. Paul etc. Co.*, 62 Minn. 198, 64 N. W. 393; *Mason City etc. Min. Co. v. Mason*, 23 W. Va. 211.)

In a common-law dedication two things are necessary and must coexist: 1. The intention of the owner to dedicate; 2. The acceptance by the public or city of the dedication. (*Cincinnati etc. Co. v. Roseville*, 76 Ohio St. 108, 81 N. E. 178; *Field v. Manchester*, 32 Mich. 279; *Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212; *Hayward v. Manzer*, *supra*; *Healey v. Atlanta*, 125 Ga. 736, 54 S. E. 749.) It is claimed by the plaintiff that the evidence wholly fails to establish an acceptance, as a street, by the city or the public of that part of Oregon avenue covering the ground in controversy. The evidence conclusively shows in this case that the city and the public never in any manner claimed or attempted to assert any authority over, or otherwise did any act showing an acceptance of, the ground until about twenty,

years after the plat had been filed. An acceptance must be exercised within a reasonable time after the offer to dedicate. (*Field v. Manchester, supra*; *John Mouat L. Co. v. Denver*, 21 Colo. 1, 40 Pac. 237; *Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212; *Cass County Supervisors v. Banks*, 44 Mich. 467, 7 N. W. 49; *Forsyth v. Dunnagan*, 94 Cal. 438, 29 Pac. 770.)

Messrs. Alexander Mackel, W. F. Davis, N. A. Roterling, and John E. Corette, for Respondents, submitted a brief; Mr. Corette argued the cause orally.

An examination of the plat will disclose the fact that the width of Oregon avenue can be determined from the plat. We do not think it was necessary to write upon that portion of the plat covered by the ground in question here the number of feet that the street is wide. (*Coe College v. Cedar Rapids*, 120 Iowa, 541, 95 N. W. 267.) That Oregon avenue constituted a public street is certain. In a Minnesota case the plat showed a strip along a lake. It had no name or number; streets at right angles connected with it. Three lots would be without access unless this was a street. It was held that the strip was dedicated as a street. (*Menage v. Minneapolis*, 104 Minn. 195, 116 N. W. 575; 2 Lewis on Eminent Domain, 3d ed., secs. 490, 491.)

The record discloses that the owners of the ground many years ago made a plat and dedicated Oregon avenue to public use forever; that Oregon avenue was accepted by the public; and that lots abutting upon this street were sold to third parties. Under this state of facts we contend that all the steps necessary were taken and that Oregon avenue was properly dedicated as a street and dedicated to public use forever. (*Hanson v. Proffer*, 23 Idaho, 705, 132 Pac. 573; *Farlin v. Hill*, 27 Mont. 27, 69 Pac. 237.) A defective statutory dedication may become a good common-law dedication. (1 Elliott on Roads and Streets, 3d ed., sec. 124; 4 McQuillin on Municipal Corporations, secs. 1561 *et seq.*; 3 Dillon on Municipal Corporations, 5th ed., secs. 1073, 1074; 2 Lewis on Eminent Domain, 3d ed., sec. 492.)

Selling lots according to the map or plat on which streets and alleys are delineated, whether recorded or not, operates as an irrevocable dedication of the streets to the municipal government and to the public use. (*City of Eureka v. Croghan*, 3 Cal. Unrep. 24, 19 Pac. 485; *Kittle v. Pfeifer*, 22 Cal. 484; *In re Common Council of Brooklyn*, 73 N. Y. 179; *Bridges v. Wyckoff*, 67 N. Y. 130; *Lockland v. Smiley*, 26 Ohio St. 94; *Preston v. Navasota*, 34 Tex. 684; *Winona v. Huff*, 11 Minn. 119; *Carter v. Portland*, 4 Or. 339.) "The act of dividing up a parcel of land into lots, streets and alleys and selling lots with clear reference to a map or plat representing such divisions is an immediate and conclusive dedication of such streets and alleys to the use of the purchaser and of the public." (*Schneider v. Jacob*, 86 Ky. 101, 5 S. W. 350.) User proves acceptance. (*San Francisco v. Canavan*, 42 Cal. 541; *Carpenteria School District v. Heath*, 56 Cal. 478.) "Dedication of land for a public highway need not be evidenced by writing, but may be by any means clearly indicating intention to dedicate." (*Buntin v. Danville*, 93 Va. 200, 24 S. E. 830; *Sweatman v. Deadwood*, 9 S. D. 380, 69 N. W. 582; *Fairbury Union Agricultural Board v. Holly*, 169 Ill. 9, 48 N. E. 149.) "A dedication of a street or highway may be inferred from a long and uninterrupted user by the public with the knowledge and consent of the owner." (*McKey v. Hyde Park*, 134 U. S. 84, 33 L. Ed. 860, 10 Sup. Ct. Rep. 512; *Pollard v. Hagan*, 44 U. S. 212, 11 L. Ed. 565.) That the owner of the ground recognized the street as an existing fact is proper to be proven and considered by the court. (*People v. Blake*, 60 Cal. 497; *City of Eureka v. Armstrong*, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085; *Wilder v. St. Paul*, 12 Minn. (Gil. 116) 192.) The ground was accepted as a street by the city and it built a water plug many years ago upon the same, but acceptance by the abutting owners is a sufficient acceptance on the part of the public. (*Evans v. Blankenship* (Ariz.), 39 Pac. 812.)

The occupancy of a portion of a street by a cheap wooden structure cannot confer rights against the city, no matter how long continued. (*Cheek v. Aurora*, 92 Ind. 107; *Brooks v.*

Riding, 46 Ind. 15; *McClelland v. Miller*, 28 Ohio St. 488; *Lane v. Kennedy*, 13 Ohio St. 42.)

Section 2600 of the Code of 1895, providing that all highways, roads, streets, *etc.*, then traveled or used by the public are public highways, was held to be a curative statute in *State v. Auchard*, 22 Mont. 14, 55 Pac. 361, and in *Montana Ore Purchasing Co. v. Butte etc. Min. Co.*, 25 Mont. 427, 65 Pac. 420.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This suit was instituted by Louis Kaufman against the city of Butte and its street commissioner, to obtain an injunction. The plaintiff alleges that he is the owner, in possession, and entitled to the possession, of a certain piece of land 80x100 feet in extent, described by metes and bounds with reference to the lots and blocks in Central addition to Butte; that he has upon the ground a frame building of the value of \$200, which the defendants threaten to and, unless restrained, will remove. The joint answer denies plaintiff's title or right to the possession of the ground, but does not deny his actual possession. It is [1, 2] alleged that the ground constitutes a part of Oregon avenue, which is a public street of the city of Butte, and that for more than ten years it has been regularly laid out, dedicated and used as a public thoroughfare or street of the city. There is a denial of knowledge or information as to whether the plaintiff owns the building in dispute, and an admission that the defendants intended to remove it unless restrained by the court. The answer further alleges "that ever since September 4, 1888, the said tract constituted and was part of a public street of the said city of Butte, and ever since has remained and now is such." By way of an affirmative defense, the defendants undertake to plead a statutory dedication to the public use of the tract in dispute, as a part of Oregon avenue. The answer concludes with a prayer for an injunction restraining the plaintiff from asserting any claim to the ground or interfering with the city and its officers in their efforts to remove the building.

The reply is, in effect, a general denial of the affirmative allegations contained in the answer. Upon the trial, the defendants were required to assume the burden of showing that the city then had a better right to the use of the ground than the plaintiff in actual possession, and, in attempting to sustain the burden thus imposed, they introduced in evidence a plat of Central addition, upon which the ground in dispute is delineated as a part of Oregon avenue. It was made to appear that Warren, Noyes, and Upton owned the land comprising Central addition; that in 1888 they had the ground surveyed, a plat made and filed, upon which plat the streets, avenues, and alleys, including Oregon avenue and the ground in dispute, were shown. Evidence was also introduced tending to show the use actually made by the public of this portion of Oregon avenue now claimed by the plaintiff, and of sales of lots in Central addition abutting upon this portion of Oregon avenue and described in the deed with reference to the plat which had been filed by Warren, Noyes and Upton. The evidence further disclosed that the building claimed by plaintiff was moved to its present location about 1897 by a predecessor of plaintiff, who laid no claim to the ground upon which the building was located. The trial resulted in a general finding in favor of defendants, and a decree which follows substantially the prayer of the answer. The plaintiff has appealed from an order denying his motion for a new trial.

That the court correctly denied to plaintiff equitable relief is beyond controversy. Whether his complaint states a cause of action for an injunction is not very material. When in the course of the trial the evidence disclosed, as it did, that plaintiff had no title whatever to the ground in controversy, and that the building claimed by him was personal property, the value of which is easily determinable, in the absence of any facts pleaded disclosing that he will be injured beyond the value of the building in case it is removed, there was not any excuse for his invoking the aid of a court of equity. If the building is removed and he suffers by reason thereof, a court of law will

afford him complete relief by way of damages. (*Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49; *Eisenhauer v. Quinn*, 36 Mont. 368, 122 Am. St. Rep. 370, 14 L. R. A. (n. s.) 435, 93 Pac. 38; *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46.) The only question which plaintiff could thus present for adjudication was one with respect to which the defendants were entitled to a jury trial, and this was an added reason for refusing him equitable relief. (*City of Bozeman v. Bohart*, 42 Mont. 290, 112 Pac. 388.)

The only question involving any difficulty whatever is suggested by the inquiry: Did the trial court err in granting the defendants affirmative relief? In order to warrant the decree which was entered, the court must have found that the ground in controversy is a part of a public street of the city of Butte. It may be conceded that the original owners of Central addition did not comply substantially with the law in force in their attempt to make a statutory dedication of the streets, avenues, and alleys; but, nevertheless, the allegations of the answer referred to above, in the absence of a special demurrer, are sufficient to admit proof of a common-law dedication, if, indeed, evidence of such dedication was not admissible under the general denial; and, if the evidence is sufficient to show such dedication, the decree must stand.

The essential elements of a common-law dedication are (1) [3] the offer on the part of the owner evidencing his intention to dedicate, and (2) the acceptance on the part of the public. (*City of Los Angeles v. Kysor*, 125 Cal. 463, 58 Pac. 90; *John Mouat Lumber Co. v. City of Denver*, 21 Colo. 1, 40 Pac. 237; 2 Lewis on Eminent Domain, sec. 492; 3 Dillon on Municipal Corporations, 5th ed., p. 1695; Elliott on Roads and Streets, sec. 123; 13 Cyc. 453, 461.) That the filing of the plat by Warren, Noyes and Upton, upon which Oregon avenue is shown [4] as a street, though insufficient to meet the requirements of the statute in force at that time, was a sufficient offer to the public of the ground thus marked as a street, and, in the absence of any evidence to the contrary, indicated the intention of the

owners to dedicate that ground to the public for a highway, is the rule quite generally recognized by the authorities. (*City of Anaheim v. Langenberger*, 134 Cal. 608, 66 Pac. 855; *Owen v. Brookport*, 208 Ill. 35, 69 N. E. 952; *Keyport v. Freehold etc. Ry. Co.*, 74 N. J. L. 480, 65 Atl. 1035; Elliott on Roads and Streets, sec. 121; 3 Dillon on Municipal Corporations, 1079, 1090; 4 McQuillin on Municipal Corporations, 3246; 2 Lewis on Eminent Domain, sec. 492.)

The evidence upon the extent and character of the use made of this portion of Oregon avenue within the next few years following the filing of the plat is apparently somewhat uncertain as presented to the lower court, while, as revealed to us in the printed record, much of it is simply incomprehensible. [5] It appears that a map or plat was used upon the trial, to which the attention of the witnesses was directed; and, while their testimony was doubtless intelligible enough to the trial judge, who observed their actions in indicating the points made prominent in their testimony, it is meaningless to us, in the absence of the map and any indications in the record fixing the particular points emphasized. For example: A portion of the testimony given by the witness Henderson reads as follows: "It stood along in there (illustrating on map). This place here was an opening. Q. This place here is where it is marked 'barn' and east of there where your pencil was? A. Yes, sir; that was a driveway that the Butte Hardware graded out here to get teams up into this place. Q. Into this place, you say, Oregon avenue? A. I did not know that it was Oregon avenue, or I did not know that there was a street there, for that matter. Q. But that is where they had the driveway? A. Yes, sir; they come down along here, come down this street here, turn over here, there was a hill here, turn around here," etc. This method of presenting a record to the appellate court has been condemned so often and so vigorously that it is now inexcusable. (*Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203, 565.)

In this character of action, the appellant has the burden of [6] showing that the evidence preponderates against the trial

court's findings (*Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Delmoe v. Long*, 35 Mont. 139, 88 Pac. 778; *Kift v. Mason*, 42 Mont. 232, 112 Pac. 392; *Orton v. Bender*, 43 Mont. 263, 115 Pac. 406; *Winslow v. Dundom*, 46 Mont. 71, 125 Pac. 136; *Wright v. Brooks*, 47 Mont. 99, 130 Pac. 968); and in this instance he has failed (1) because he has not presented a record that can be understood in its entirety, and (2) because, in our opinion, the evidence, so far as it can be understood, is sufficient [7] to show such user of this portion of Oregon avenue by that part of the general public having occasion to use it, and such sale of lots with reference to the plat of Central addition on file, as constituted an acceptance and completed the common-law dedication long before any part of the avenue was occupied by the building now claimed by the plaintiff. We agree with [8] counsel for appellant that the acceptance must occur within a reasonable time after the offer is made, or, in this instance, after the plat was filed, and we refer particularly to the testimony of witnesses Henderson, Carman, and Carr to justify the conclusion that such acceptance as the law requires was had in this instance.

Our conclusion is that the ground in controversy became a part of a public street, and that the city acquired an interest in it superior to that attaching to the naked possession of plaintiff, based as it is upon a trespass by his predecessors in the ownership of the building. The fact that for a short time, probably fifteen months, a large portion of this strip of ground in controversy was inclosed by a corral fence, and that since 1897 this frame building has occupied a small portion of the same ground, cannot operate to divest the city of its right to control it as a part of one of its streets. The evidence shows conclusively that plaintiff's predecessors, who owned the building until within three or four years of the commencement of this suit, were not holding the ground upon which the building stands adversely to the city, and the fact, if it be a fact, that [9] the city officials negligently or wrongfully permitted the unlawful use of this portion of the street cannot defeat the right

of the public to its use for the purposes for which it was dedicated. (Elliott on Roads and Streets, sec. 653.)

The order denying a new trial is affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. JACOBS, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 3,421.)

(Submitted January 5, 1914. Decided January 20, 1914.)

[138 Pac. 1091.]

*District Judges—Disqualification—Affidavit of Imputed Bias—
Time of Filing—Waiver—Continuances.*

District Judges—Affidavit of Bias and Prejudice—When Too Late.

1. At the time set for hearing a matter in probate, it was continued for four days. On the day before the expiration of the continuance an affidavit was filed by one of the parties imputing bias and prejudice to the presiding judge. *Held*, on *mandamus*, that the affidavit was properly stricken, it not having been filed before the day originally fixed for the hearing, as provided by amended section 6315, Revised Codes (Laws 1909, Chapter 114), and the statute not making any provision for filing such affidavits during continuances as such.

[As to disqualification of judge to act in probate matter because of interest in estate, see note in Ann. Cas. 1912C, 1165.]

Same—Waiver.

2. Like the peremptory challenge of a juror, the disqualification of a district judge for imputed bias under section 6315, Revised Codes, *supra*, is waived if not exercised at the proper time.

[As to waiver of objections to disqualified judge, see note in Ann. Cas. 1912A, 1072.]

Original application for *mandamus* by the state, on the relation of A. R. Jacobs against the district court of the fifth judicial district, for Beaverhead county, and W. A. Clark, a judge thereof. Dismissed.

Mr. Richard H. Smith, and *Mr. Harry H. Parsons*, for Relator, submitted a brief, as well as one in reply to that of respondents; *Mr. Parsons* argued the cause orally.

Messrs. Norris, Hurd & Smith, for Respondents, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On November 15, 1913, the relator herein filed in the district court of Beaverhead county his final report and account as guardian of the estate of Venora E. Metlen, incompetent. To this report and account D. E. Metlen, as the husband of Venora E. Metlen, filed certain objections. By order of court, the respondent, Judge Clark, presiding, the hearing upon the report, account and objections was set for December 9, 1913. On that [1] day the objector and his wife appeared in person and by counsel, and announced their readiness to proceed; the guardian was not present nor represented. Judge Clark then stated that he had received a communication from the relator to the effect that a compromise had been reached in said matter, whereby the relator was to be paid \$1,200, in addition to the sums theretofore received by him, as payment for his services rendered therein. To this counsel for Mr. and Mrs. Metlen responded that the agreement was for the payment of a balance of \$700 only to the relator. Whereupon the judge, being of the opinion that the relator should be present at the hearing, and that his failure to appear was due to a misunderstanding, ordered "that further proceedings in said matter be continued until Saturday, December 13, 1913, at 10 o'clock A. M." On December 13, 1913, the matter was again called up, counsel for all the parties being present, and the clerk exhibited an affidavit of the relator, filed the preceding day, seeking to disqualify Judge Clark on account of imputed bias and prejudice. This affidavit was ordered stricken from the files because filed after the day fixed for the hearing of the matter, and after the hearing thereof had in fact commenced, and further hearing was again continued "on account of pressure of business of the court" to December 16, 1913, at 4 P. M. The alternative writ of mandate issued out of this court on December 15, 1913, has prevented further action. The respondent is one of the judges of the fifth judicial district, which includes the county of Beaverhead, and the other judge thereof was disqualified by reason of having been an at-

torney in said matter. The question presented is whether, upon the facts stated—we do not deem the other facts of record as important—a peremptory writ of mandate should issue to Judge Clark, directing that he revoke the order striking the affidavit of the relator from the files, that he restore the same, and that he make an order calling in another district judge to hear and determine the controversy or transfer it to some other district in this state.

In our view of this proceeding it is not necessary to decide whether *mandamus* may be properly invoked to compel a district judge to give effect to an affidavit of disqualification duly filed under the statute. Assuming *mandamus* to be a proper remedy, we nevertheless think that it is not available to the relator, for the following reasons: The statute involved (Rev. Codes, sec. 6315, as amended, Laws 1909, p. 161) provides: “Any * * * judge * * * must not sit or act as such in any action or proceeding: * * * 4. When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. Such affidavit * * * shall be filed * * * at any time before the day appointed or fixed for the hearing or trial of any such action, motion or proceeding.” This provision has been before this court for construction on several occasions, once under such circumstances as to render the views then expressed practically decisive of the instant case. The decision referred to is *State ex rel. Nissler v. Donlan*, 32 Mont. 256, 80 Pac. 244, and from the statement of facts it appears to have been a hearing upon motions to adopt and to reject the findings of a referee upon an executor’s account to which objections had been filed. The hearing was originally set for February 18th, at which time a motion was made to vacate the setting on the ground that Judge Donlan had not jurisdiction to proceed. This motion was based upon the theory that Judge McClernan, of the same court, who had previously taken cognizance of the proceedings, had upon the redistribution of

the work of that court among the three judges thereof, reserved to himself for hearing and determination all matters connected with the settlement of the executor's account, notwithstanding that proceedings in probate had in general been assigned to the department presided over by Judge Donlan. The motion was overruled by Judge Donlan. During the noon recess Judge McClernan, without consulting with either of the other judges, made a formal order reserving the hearing to his department. When the court reconvened, Judge Donlan declined to regard this order as binding, but postponed further hearing of the motions until February 25th, and on that day a further postponement was had to March 4th. In the meantime an affidavit was filed, seeking to disqualify Judge Donlan under the provision above quoted, but Judge Donlan declined to relinquish jurisdiction, and refused to make an order transferring the matter. It will be observed that the difference between the facts in the *Nissler Case* and those at bar is not material. It does not appear that anything occurred in that case before the postponement, except an assertion by Judge Donlan of his own authority, which did not in any sense touch the merits of the matter before the court. Counsel for the relator at bar suggest that a hearing has begun only when it may be said that a new judge "could not step in and at that very moment proceed with the hearing with a full and complete knowledge of the proceedings." Without either accepting or rejecting this test, we may say that nothing is disclosed in the *Nissler Case* that would have prevented a new judge from proceeding with the hearing after the affidavit was filed, with full and complete knowledge, yet upon the circumstances of the *Nissler Case* this court, speaking through the chief justice, said: "Was the affidavit filed in time to disqualify Judge Donlan from hearing the motion upon settling the account? * * * Section 180 * * * declares that the particular disqualification of imputed bias and prejudice shall be made to appear by affidavit filed at any time before the day fixed for the trial or hearing. * * * The intention is clearly manifested that the affidavit is not to be regarded as effective

to interrupt a hearing after the arrival of the day fixed for that purpose. * * * The disqualification of imputed bias and prejudice provided for in subdivision 4 of the Act is purely statutory. It does not rest upon the ascertainment of any fact, but only upon an imputation. Such being the case, and the statute being open to so much abuse, we are inclined to construe it strictly according to its express terms, and not broaden it by implication to include conditions not clearly within them.

* * * The statute does not admit of a construction that would permit a litigant to file an affidavit of disqualification after the day for hearing has arrived, and thus rob the court or judge of the power to proceed." These views and the application of them to the present case are supported, to a greater or less degree, by the following authorities: *Redman v. State*, 28 Ind. 205; *Allen v. Coates*, 29 Minn. 46, 11 N. W. 132; *State ex rel. Dearborn v. Merrick*, 101 Wis. 162, 77 N. W. 719.

It is suggested that, as the statute does not make any express allowance for continuances of any kind, and as a continuance over the term must certainly restore the situation prior to the setting, the right to disqualify cannot expire on the day before the first setting, but must be carried forward with each continuance for whatever period. The answer is twofold: The failure of the statute to make allowance for continuances as such is persuasive, at least, that no such allowance was intended; and this belief is strengthened when we consider the ease with which such an intention, if entertained, could have been expressed. That the legislature knew how to say what it wanted to say with reference to such matters may be gathered from the other provisions of the Code designed to secure fair trials in the case of actual bias. (Rev. Codes, secs. 7484, 6505, 6987.) Moreover, the passing of a cause over the term necessarily operates as a vacation of the setting, and a very real distinction exists between that situation and a mere continuance, properly so called, however difficult, it may be to put the distinction into words. Where the effect of an order is to vacate the setting, the case stands for all purposes of the statute under review as though

no setting had been made; but where the effect of an order is to stand upon the setting and, reckoning from that, to defer the trial to a day certain, we can see no reason why the day originally fixed for the hearing should not measure the time limit of disqualification for imputed bias. Actual disqualification on the part of a judge may be manifested at any time after as well as before the date fixed for a hearing, and it is therefore available in probate proceedings whenever it is made to appear; but the privilege to impute bias to a judge where none may exist belongs to a different order of things and its existence may fairly be limited to a given time. The disqualification of a judge for [2] imputed bias is like the peremptory challenge of a juror, which may not be exercised after he has once been passed. (*Washoe Copper Co. v. Hickey*, 46 Mont. 363, 128 Pac. 584; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169.)

The relator suggests that under the above construction it is possible to restrict the disqualifications for imputed bias to a single judge, contrary to the express provision of the statute. We think the danger is more imaginary than real. Expressly acquitting the relator and his counsel of any impropriety, we say that the statute was not intended to encourage perjury, nor to aid delays, nor to secure postponements which are not deserved. If a litigant really feels that he cannot secure a fair and impartial trial before a certain judge, he is generally conscious of that feeling before the day fixed for the hearing, and long enough to enable him, by a prompt and proper disclosure of it, to secure to himself every substantial right.

Conceiving, as we do, that the action of the respondent, Judge Clark, was within the letter of the statute in question and within any wise purpose to be served by it, the proceedings herein should be dismissed; and it is so ordered.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied February 6, 1914.

DONLAN, APPELLANT, v. ARNOLD ET AL., RESPONDENTS.

(No. 3,329.)

(Submitted January 7, 1914. Decided January 22, 1914.)

[138 Pac. 775.]

Logs and Logging—Contracts—Extension—Offer and Acceptance—Evidence—Forfeitures—Relief—Prerequisites.

Contracts—Extension—Offer and Acceptance—Evidence.

1. The contention that a contract, under the terms of which standing timber was to be removed within a certain time, had been extended by an oral agreement between the parties, was not sustained by evidence showing an offer on the part of the owner, kept open for nearly two months, and a counter-proposition by an agent of the purchaser to whom the latter had sent a check for the consideration demanded by the owner, together with instructions to close the deal, the agent breaking off negotiations without communicating the acceptance or tendering the consideration.

Same—Forfeiture—Relief from—Prerequisites.

2. *Held*, under the rule that before a party may have the protection afforded by section 6039, Revised Codes, against loss in the nature of a forfeiture of payments made under a contract which he has failed to fully perform, he must show by his pleading and proof that his breach of duty was not, among other things, grossly negligent, that plaintiff who, after purchasing standing timber with the understanding that it should be removed before a certain date five years thereafter, did nothing in the premises until sixty days before the expiration of the time limit, when he entered into negotiations for an extension of the life of the contract, and then delayed taking action until a few days before the end of the five-year period when his agent, though instructed to close the transaction by accepting an offer made by the owner, broke off negotiations and failed to communicate the acceptance or tender the consideration asked, was not entitled to relief.

[As to relief in equity from forfeitures, see notes in 68 Am. Dec. 85; 86 Am. St. Rep. 48.]

Appeal from District Court, Sanders County; R. Lee McCulloch, Judge.

ACTION by Edward Donlan against Lewis Arnold and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Messrs. Harry H. Parsons, A. N. Whitlock, and James M. Self, for Appellant, submitted a brief.

Appellant contends that there was an oral contract entered into between the parties to this action, whereby the defendants,

in consideration of plaintiff's promise to pay \$500, agreed to extend the time within which the plaintiff could remove his timber for one year. Acceptance of an offer counts from the time of its mailing, and the fact that the check in this instance was mailed to a third party rather than to Arnold makes no difference, especially since Arnold himself could not be located. The check was put completely out of plaintiff's power. There was certainly as good an acceptance here as would have been the case had the check been mailed to Arnold and because of miscarriage in the mails had not reached him until after July 17th. In the latter case it is universally held that the acceptance is complete upon mailing. (*Canterbury v. Sparta*, 91 Wis. 53, 51 Am. St. Rep. 870, 30 L. R. A. 845, 64 N. W. 311; *Patrick v. Bowman*, 149 U. S. 411, 37 L. Ed. 790, 13 Sup. Ct. Rep. 811; *Watson v. Russell*, 149 N. Y. 388, 44 N. E. 161; *Chytraus v. Smith*, 141 Ill. 231, 30 N. E. 450.) The same holding is found in the telegraph cases. (*Andrews v. Schreiber*, 93 Fed. 367.) The failure of Mr. Burleigh to tender the check to Arnold is not fatal, for Arnold at that time made it clear that a tender would be unavailing and under those circumstances a tender is unnecessary. (*Creek Land etc. Co. v. Davis*, 28 Okl. 579, 115 Pac. 468; *Ansley v. Hightower*, 120 Ga. 719, 48 S. E. 197; *Martin v. Bank*, 131 N. C. 121, 42 S. E. 558; *Ashley v. Rocky Mt. Bell Tel. Co.*, 25 Mont. 286, 64 Pac. 765; *Austin v. St. Louis Transit Co.*, 115 Mo. App. 146, 91 S. W. 450.)

If there was an oral contract between the parties to extend the time for removing the timber, two objections might arise: (1) That since this latter contract was oral, it could not be used to vary the original written conveyance, because of the parol evidence rule; and (2) that such contract would be required to be in writing under the statute of frauds. In the absence of statute, there is nothing to prevent a subsequent oral agreement supplanting, releasing or revoking the prior written one, so far as the parol evidence rule is concerned, but here we do not have to go so far as that for the subsequent agreement does not even vary the terms on the original instrument. More-

over, the establishment of such an oral agreement and the failure to comply therewith would amount to fraud on the part of the defendants, the showing of which cannot be objected to. (*Harris v. Murphy*, 119 N. C. 34, 56 Am. St. Rep. 656, 25 S. E. 708; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *King v. Seebeck*, 20 Idaho, 223, 118 Pac. 292; *Schweikert v. Seavey*, 6 Cal. Unrep. 554, 62 Pac. 600.)

It is true that the contract or instrument of conveyance of the timber in question was required to be written, but that does not mean that a contract extending the time of removal must be in writing. The oral agreement, if any such existed, did not purport to convey land and in fact had to do with real estate only to the extent that it fixed the time of removal of timber after severance. (*King v. Seebeck*, 20 Idaho, 223, 118 Pac. 292; *Harman v. Harman*, 70 Fed. 894, 17 C. C. A. 479; *Hines v. Wilcox*, 96 Tenn. 148, 54 Am. St. Rep. 823, 34 L. R. A. 824, 33 S. W. 914; *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990.) The cases where there was an extension of time for redemption are quite analogous to the case at bar and their holdings are in accord with the principle above stated. (*Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119; *Judd v. Mosely*, 30 Iowa, 423; *Kaler v. Grady*, 18 Ky. Law Rep. 678, 37 S. W. 955.)

A court of equity looks with disfavor upon all forfeitures and will never allow one to operate if it appears that it was brought about by any fault of the party desiring it; and even without his fault, it will not be allowed if any means can be found whereby the party claiming such forfeiture can be adequately compensated. This principle is well illustrated in a great variety of cases, notably the cases involving forfeiture of past payments, in cases where contracts to sell lands are not carried out, and in foreclosure cases. In fact, this doctrine in the law is much older than the doctrine with reference to the removal of timber within a specified time. (See *Cue v. Johnson*, 73 Kan. 558, 85 Pac. 598; *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88; *Cheney v. Bilby*, 74 Fed. 52, 20

C. C. A. 291; *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157; *Prondzinski v. Garbutt*, 8 N. D. 191, 77 N. W. 1012; *Holman v. Omaha etc. Bridge Co.*, 117 Iowa, 268, 94 Am. St. Rep. 293, 62 L. R. A. 395, 90 N. W. 833; *Fields v. Killion*, 129 Ala. 373, 29 South. 797; *Wheeling etc. R. Co. v. Triadelphia*, 58 W. Va. 487, 4 L. R. A. (n. s.) 321, 52 S. E. 499; *Toledo etc. R. Co. v. St. Louis etc. R. Co.*, 208 Ill. 623, 70 N. E. 715; *Waldron v. Toledo etc. Ry. Co.*, 55 Mich. 420, 21 N. W. 870; *Schroeder v. Young*, 161 U. S. 334, 40 L. Ed. 721, 16 Sup. Ct. Rep. 512; *Wallace v. Dodd*, 136 Cal. 210, 68 Pac. 693; *Kampman v. Kampman*, 98 Ark. 328, 135 S. W. 905.)

Messrs. Tolan & Gaines, for Respondents, submitted a brief; *Mr. R. F. Gaines* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On July 17, 1905, the parties to this suit entered into a contract wherein the respondents, for a valuable consideration, sold to the appellant all the timber growing upon a certain tract of land situated in Missoula county, upon the condition that the timber be cut and removed on or before July 17, 1910. In the fore part of May, 1910, the appellant, having done nothing toward cutting or removing the timber, and realizing that the contract would soon expire, requested one Fairbanks to see Mr. Arnold and ascertain from him upon what terms an extension for one year could be procured. Fairbanks saw Arnold, who said he would grant such extension for \$500, adding that he was anxious to have the land cleared up, that he would rather have the timber taken off than to have the money, and that "to run over a month or two over the present year there would be no extra charge." Fairbanks wrote at once to the appellant, advising him to see Arnold. Between June 4th and 8th, appellant went to Plains to see Arnold, but failed to do so, learning that Arnold was at St. Regis. Upon June 27th the appellant sent his bookkeeper, Mr. Keith, to Plains to get Mr. Burleigh to go to Arnold and get an extension. Keith went to

Plains and saw Mr. Burleigh, but nothing was done because Arnold was out of town. A few days later Mr. Burleigh saw Arnold and talked with him. Touching this conversation, Mr. Burleigh testifies: "He (Arnold) never denied that he had agreed to grant an extension for a year on the basis of \$500, but complained and said that he had of course expected that he would see Mr. Donlan, that Mr. Donlan had not showed up or anybody else had not showed up. * * * I asked Mr. Arnold what he would take if the timber could be cut off sooner than a year. He seemed to be anxious to have the timber cut off, and there was no satisfactory understanding arrived at. I think Mr. Arnold told me he would consider the matter." In the last of June or first part of July appellant himself went to Plains to see Arnold, but Arnold was at Camas Springs. On July 12th Keith sent a check for \$500 to Mr. Burleigh, and within a day or two appellant himself went to Paradise to see Mr. Burleigh and have him close up the deal, which he promised to do if Arnold was at home. Mr. Burleigh saw Arnold on the 13th or 14th and spoke to him about the matter of terms for a shorter extension, and Arnold "said he had come to a conclusion about it, and that the only conditions upon which he would allow Mr. Donlan to cut that timber was * * * a stumpage basis at the same rate as paid to the state." Whereupon Mr. Burleigh, deeming it useless to tender the check, simply kept it and quit the negotiations without making any tender. At no time after the interview between Fairbanks and Arnold was any tender made to Arnold or anything written to him; nor was anything said to him indicative of an acceptance of his terms, save as above set forth.

The foregoing facts, constituting the substance of all the evidence in the case, were presented under an amended complaint which declared upon two causes of action, *viz.*: (a) To quiet appellant's title as owner of the timber; and (b) to compel respondents to "execute a sufficient grant" to the appellant of the right to enter the premises and cut and remove the timber. Issue was joined by the answer, which denied the essential allega-

tions of the amended complaint, which affirmatively asserted title to any right of possession of the timber in the respondents, which alleged the expiration of the original agreement, and which assailed the validity of the alleged extension upon various legal grounds connected with the oral character of the same. In the reply it is pleaded that the failure to have the extension reduced to writing was due wholly to the acts of respondents, and that the respondents are by their acts estopped to claim the timber or to question the right of the appellant to enter the lands in question and remove the timber therefrom. At the close of plaintiff's evidence, there was an order of nonsuit, upon which a judgment was thereafter given and entered, denying relief to the appellant and granting the prayer of respondents' answer. From that judgment this appeal is taken.

The appellant, conceding that under the decision of this court in *Hollensteiner v. Missoula Lumber Co.*, 37 Mont. 278, 96 Pac. 420, no right remained in him to cut the timber left when the contract of July 17, 1905, expired, makes the following contentions: (1) That the evidence discloses an enforceable oral contract between the parties for a year's extension; and (2) assuming that no such contract was made, the rule of *Hollensteiner v. Lumber Co.* works a forfeiture which should not be enforced in this case, in view of the equities disclosed by the record. Of these in their order.

1. It is impossible to extract anything more from the conduct [1] of Arnold than a mere offer to extend for a year for a certain consideration. Instead of accepting this offer, the appellant, through the agent chosen by him, asked terms for a shorter extension. No pretense is made that the appellant ever accepted Arnold's offer until the check was sent to Burleigh, on July 12th, and instructions were given him by the appellant on July 13th to close the transaction. This assumed acceptance was purely subjective and of no effect, because the agent chosen by the appellant did not communicate the acceptance nor tender the consideration. On the contrary, he inquired concerning the terms for a shorter extension, and, being met by a flat refusal to

grant any extension, departed without further ado. If we imagine the respondents seeking to recover from the appellant the price of this alleged extension, some notion may be gained of the utter infirmity of the claim that a contract was entered into therefor. A contract is not created by a mere offer, even though kept open for nearly two months, which is revoked before acceptance. The principles involved are too fundamental and too elementary for discussion. (Rev. Codes, sec. 4992; *Brophy v. Idaho P. & P. Co.*, 31 Mont. 279, 78 Pac. 493; *State ex rel. Henderson v. Board of State Prison Commrs.*, 37 Mont. 378, 96 Pac. 736; *Monahan v. Allen*, 47 Mont. 75, 130 Pac. 768.)

2. Assuming that the application to this case of the rule of *Hollensteiner v. Lumber Co.* involves a loss in the nature of a [2] forfeiture, the views of this court, as recently expressed upon this subject, become pertinent. In *Clifton v. Willson*, 47 Mont. 305, 132 Pac. 424, attention was called to the rule at common law which denied recovery for payments made or acts done by one who has stopped short of full performance of his contract, and to the circumstance that whenever relief was attainable it became so by virtue of the rule of equity against forfeitures; that the rule against forfeitures, so far as this state is concerned, is expressed in section 6039 of our Codes, and a party seeking its benefit must by his pleading and proof bring himself within it. It is not enough to say on appeal that a loss in the nature of a forfeiture may be incurred by enforcing the terms of a contract which the parties themselves have made; but, to secure the protection of section 6039, it must be invoked, and "the very minimum requirement is that the party invoking the protection afforded by that section must set forth facts which will appeal to the conscience of a court of equity." (*Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700.) A concrete application of these rules illustrating some circumstances authorizing relief from a loss in the nature of a forfeiture is furnished by the case of *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694. The effect of all these cases is that relief from forfeiture cannot be

awarded to one who fails to show that his breach of duty was not grossly negligent, willful, or fraudulent.

The respondents vigorously and with some reason contest the sufficiency of the pleadings as a basis for relief from forfeiture. But, passing that, we are without warrant for such relief in the facts established on the trial. The appellant, holding a five-year contract, the expiration of which he must have known would leave him without any right, waited four years and ten months before taking any action, either toward removing the timber or toward securing an extension. About sixty days before the end, he authorized an agent to negotiate for terms of an extension. At that time he could have removed the timber by going to some extra expense. The agent sent to negotiate for terms of extension secured an offer which he communicated to the appellant without delay, and the appellant could by a prompt acceptance of the offer have settled the matter beyond question. Presumed to know that the law afforded the privilege to Arnold to revoke his offer at any time before notice of acceptance, the appellant nevertheless delayed even his subjective acceptance until within a few days of the end of the contract, and then through his agent failed to communicate that acceptance before the offer was revoked. In explanation it is suggested that Arnold's statements that he would rather have the timber taken off than have the money, and that "to run over a month or two over the present year there would be no extra charge," lulled the appellant into a false security. Whether these statements, if communicated to the appellant, would have justified his course we do not determine, because the appellant does not prove that he ever heard of them or that they ever misled or influenced him in any way. The only rational inference is to the contrary. It is true that he says, "I relied absolutely on anything Mr. Arnold said to Mr. Fairbanks and anything Mr. Fairbanks would say to me"; but he could not rely on anything said to Fairbanks unless Fairbanks communicated it to him, and the only communication from Fairbanks to him was the letter sent immediately after Fairbanks had talked

with Arnold. This letter "was to the effect that he went down and seen Mr. Arnold and Mr. Arnold would give an extension for one year for \$500 and for me to see Mr. Arnold." The endeavors of appellant, in person and through Mr. Burleigh, evince to our minds, not reliance upon the statements now urged as an estoppel, but a desire to secure other terms than those offered, as well as an appreciation of the necessity to get into written form whatever might be ultimately agreed upon. When all is said for appellant that can be said, still the record does not make any adequate excuse for his failure to protect his interests under the contract, nor disclose wherein the conscience will be shocked by permitting the matter to rest where his neglect has placed it. (*Fratt v. Daniels-Jones Co., supra.*)

The order of nonsuit was correct, and the judgment founded thereon is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

LEITNER ET AL., APPELLANTS, v. CURRIER, RESPONDENT.

(No. 3,316.)

(Submitted November 19, 1913. Decided January 26, 1913.)

[138 Pac. 1087.]

*Breach of Contract—Defenses—Compromise and Settlement—
Erroneous Instructions.*

1. In an action for breach of a contract of sale of livestock, in which defendant relied for his defense on a compromise and settlement of the differences between him and plaintiff, *held*, that the trial court properly granted a new trial because of error in too narrowly restricting the scope of such defense in its instructions to the jury.

*Appeal from District Court, Custer County; Sydney Sanner,
Judge.*

ACTION by Frank A. Leitner and another, copartners, doing business as Leitner & McCoy, against R. D. Currier. From an order granting a new trial plaintiffs appeal. Affirmed.

Mr. George W. Farr, and *Mr. Frank Hunter*, for Appellants, submitted a brief; *Mr. Farr* argued the cause orally.

Messrs. Loud, Collins, Brown, Campbell & Wood, for Respondent, submitted a brief; *Mr. C. S. Loud* argued the cause orally.

HON. HARRY H. EWING, a Judge of the Eighth Judicial District, sitting in place of MR. JUSTICE SANNER, disqualified, delivered the opinion of the court.

Appeal from an order granting defendant a new trial. The action is for damages for a breach of contract. The contract is in writing, executed by the parties hereto, and recites that the plaintiffs, who are copartners, have agreed to sell and deliver to the defendant about 150 head of horses at \$40 per head. A payment of \$500, being part of the purchase price stipulated for, was to be made by the defendant at the time the agreement was signed, and the balance was to be paid when the horses were delivered to defendant.

It is alleged that the plaintiffs were at all times ready and willing to deliver the horses according to the terms of the contract, and that the defendant refused to accept delivery or to pay the purchase price, to the damage of plaintiffs in the sum of \$2,792.30. Among other defenses, the defendant alleges, in substance, that, when the time for delivery arrived, a controversy arose between him and the plaintiffs as to whether the horses tendered were of the character specified in the contract; that, in order to settle and adjust the controversy, it was agreed between McCoy and the defendant that the plaintiffs should retain the \$500 cash payment made in accordance with the terms of the contract, and be released from delivering any of the horses, as a complete settlement and discharge of any liability or claim for

damages arising in favor of plaintiffs by reason of defendant's refusal to accept and pay for the horses; that the written agreement should thereupon be wholly canceled and annulled; and that McCoy, acting for the plaintiffs, retained the said sum and the horses, and released and discharged the defendant and acquitted him of all obligation arising under the contract. The \$500 payment was made as provided in the contract, but no other payment was ever made.

There was a conflict in the evidence as to whether any such agreement was entered into between the defendant and McCoy, and, while the jury was instructed generally as to this defense, the court refused to give defendant's offered instruction numbered 8, which is as follows: "The jury are instructed that a contract can be released or extinguished by the parties thereto consenting and agreeing so to do, and, if you find by a preponderance of the evidence that the plaintiff McCoy did make such an agreement with the defendant Currier, then such release or extinguishment would be binding upon the copartnership of Leitner & McCoy."

The evidence proves conclusively that there was only an agreement to sell the horses—that the sale was never consummated. There being no sale of the horses by plaintiffs to defendant, there could be no resale of the horses by defendant to plaintiffs; but the court gave the following instruction, being instruction numbered 8: "The jury are instructed that it is a question of fact for you to determine whether the alleged agreement or so-called settlement between the plaintiffs and defendant occurred, and, if it occurred, whether it was, in fact, a settlement of differences or a resale of the horses involved by the defendant back to plaintiffs, and, if you find that, in fact, such transaction was a resale, and not a compromise or settlement of differences, then such resale would come within the provisions of the statute of frauds, and would be void, unless you find that the defendant in his alleged resale made a part payment to the plaintiffs, or unless the plaintiffs accepted some part of the horses in return."

The court, in granting a new trial, was of the opinion that, in giving instruction numbered 8, and refusing defendant's offered instruction numbered 8, it too narrowly restricted the scope of this special defense, and with this opinion we agree.

There are other errors assigned, but it is not necessary to consider them. The order of the court granting defendant a new trial is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

WALLACE, APPELLANT, v. CHICAGO, M. & P. S. RY. CO.
ET AL., RESPONDENTS.

(No. 3,313.)

[(Submitted November 20, 1913. Decided January 26, 1913.)

[138 Pac. 499.]

*Personal Injuries—Master and Servant—Proximate Cause—
Tools and Appliances—Duty of Master—Causal Connection
Between Injuries and Negligence—Evidence—Insufficiency—
New Trial Order—Affirmance.*

Appeal—New Trial Order—Affirmance, When.

1. Where an order granting a new trial is general in terms, it will be affirmed if it may be justified upon any of the grounds assigned in the notice of intention to move for a new trial, regardless of the reasons given by the court for its ruling.

Personal Injuries—Negligence—Proximate Cause.

2. It is only such negligent acts as bear a direct, proximate and causal relation to an injury that give a cause of action.

[As to doctrine of proximate and remote causes, see note in 36 Am. St. Rep. 807.]

Same.

3. The "proximate cause" of an injury is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred.

Same—Causal Connection Between Injury and Negligence.

4. Before negligence can become the basis of recovery in a personal injury action, a causal connection must be shown between it and the injury complained of.

Same—Proximate Cause—Proof.

5. While the efficient cause of a personal injury may be proved by indirect evidence, the circumstances must be such as to tend affirmatively to show it, to the exclusion of any theory inconsistent therewith.

Same—Master and Servant—Tools and Appliances—Duty of Master.

6. An employer is not an insurer, and is not required to select the safest appliances nor the best method for their operation, but only to furnish the appliances in general use for the same purpose, and operated in the same way, by reasonably prudent and careful men under like circumstances.

Same—Causal Connection Between Injury and Negligence—Evidence—Insufficiency.

7. Where the only ground of negligence, among others, alleged by plaintiff, a machinist's helper, and sustained by the evidence, which bore a causal connection with his personal injury, was the careless removal of a block of wood from in front of a drive-wheel about to be placed on a lathe, and not defendant company's failure to supply reasonably safe and suitable appliances for doing the work, a verdict for plaintiff under an instruction that defendant should be held liable if the injury was proximately caused by a want of safe and suitable appliances, was properly set aside and a new trial granted.

Appeal from District Court, Custer County; Sydney Sanner, Judge.

ACTION by William Wallace against the Chicago, Milwaukee & Puget Sound Railway Company, and another. From an order granting new trial plaintiff appeals. Affirmed.

Messrs. Loud & Campbell, for Appellant, submitted a brief; *Mr. C. S. Loud*, and *Mr. Henry C. Smith*, of Counsel, argued the cause orally.

Mr. George W. Farr, and *Mr. H. H. Field*, for Respondents, submitted a brief; *Mr. Farr* argued the cause orally.

HONORABLE JOSEPH B. POINDEXTER, a Judge of the Fifth Judicial District, sitting in place of **MR. JUSTICE SANNER**, disqualified, delivered the opinion of the court.

Action for personal injury. The plaintiff brought this action for injuries sustained by him while employed as a helper or laborer in the machine shop of the defendant Chicago, Milwaukee & Puget Sound Railway Company on April 4, 1912. The amended complaint, after the usual allegation as to the incor-

poration of defendant company and other formal allegations, and that the defendant Feeley was a machinist in the employ of the defendant railway company, and acting as a superintendent for and on behalf of said defendant railway company and in immediate charge of a certain lathe in the machine shop of the railway company at Miles City, Montana, and that the plaintiff was working under his immediate direction and supervision at the time of the injuries complained of, alleges that it was the duty of the defendants "to provide suitable and safe appliances and to use due and proper skill, care, and diligence in providing suitable, safe, and sufficient appliances for the transfer and passage of said wheels or trucks to and from said lathe"; that the defendants did not provide such suitable, safe, sufficient, or any appliances for such work, but, on the contrary, negligently and carelessly failed to provide any appliances whatever for the safe and proper handling of said wheels or trucks, and negligently and carelessly caused said wheels or trucks to be rolled from the place where they had been detached from the engine across the floor of said machine shop, without providing any suitable means of holding or controlling the same, and that such method and means of handling said wheels or trucks was unsuitable, unsafe and inadequate, all of which was known to the said defendants and each thereof; "that after said drive wheels had been removed from said engine they were, under the direction and control of said superintendent, Joseph Feeley, being moved by the plaintiff and certain other servants, agents, and employees of the said defendant company, each and all of whom were then acting under the immediate supervision, direction, control, and orders of the said defendant Joseph Feeley; that after said drive wheels had been moved from said track in the direction of said lathe, the said defendant Joseph Feeley caused said wheels to be stopped and blocks to be placed under said wheels to prevent the same from rolling or moving; that after said drive wheels had been blocked as aforesaid, the plaintiff, in the proper discharge of his duties as such helper or laborer, and upon the order of the said defendant Joseph Feeley, was engaged in reach-

ing down into a certain pit below the floor of said machine shop, and in taking therefrom certain hooks attached to a chain, and which said hooks and chain were then and there a part of the appliances furnished by the said defendant company, and by the said defendant company used for the purpose of hoisting wheels or trucks from the floor up to and upon said lathe in order that the same might be repaired; that before said hooks and chain would be attached to said wheels, in the ordinary course and conduct of such operations, it was necessary for said wheels to be moved nearer to said lathe than they were at the time they were so blocked as aforesaid; that while this plaintiff was then and there so engaged in the proper discharge of his duties as such helper or laborer, as hereinbefore alleged, and while then and there in a stooping or kneeling position with his back towards said wheels, the said defendant Joseph Feeley carelessly and negligently gave an order to those certain servants, agents, and employees of the said defendant company who were assisting in the moving of said wheels, in relation to the blocks which had been placed under said wheels, the exact language of which said order plaintiff is now unable to state, the substance and effect of said order being, however, a direction to said servants, agents, and employees to remove said blocks from under said wheels; that said servants, agents, and employees of said defendant company obeyed said order and direction, and negligently and carelessly moved or displaced the block from in front of said wheels, while this plaintiff was then and there in a place of danger in such kneeling position in front of said wheels, and without any warning to this plaintiff, and then and there negligently and carelessly caused and permitted said wheels to roll over, onto, and upon this plaintiff, thereby carelessly and negligently injuring plaintiff upon his body and person, as hereinafter more particularly alleged." The plaintiff's injuries are then described, and damages are claimed on account thereof. The defendants admit the employment of plaintiff as alleged and the injuries, but deny the negligence charged by the plaintiff, and set up that if there was any injury to plaintiff, it was

due to the negligence of a fellow-servant. They also plead contributory negligence and assumption of risk by plaintiff. On the trial verdict and judgment were for the plaintiff. Defendant's motion for a new trial was granted, and plaintiff has appealed.

The order granting a new trial was general in its terms, and, regardless of the reasons given by the court below for its ruling, [1] if it may be justified upon any of the grounds assigned in the notice of intention to move for a new trial, it must be affirmed. The notice of intention contained all the statutory grounds, including insufficiency of the evidence to justify the verdict, and that the verdict is against the law. Many alleged errors were urged as warranting the order. It is only necessary to consider the assignment of insufficiency of the evidence, to show that the court was correct in entering the order appealed from.

It appears that the plaintiff and other laborers were members of a wheel press gang at defendant company's shop in Miles City, and on April 4, 1912, were engaged in moving the drive wheels of a locomotive from a track to a lathe, some thirty feet distant, for the purpose of truing up the wheels; that the wheels were very heavy, and it was necessary to block them in order to hold them stationary; that for this purpose they used short wooden blocks about two inches by six or eight inches, placed in front of and behind the wheels; that this blocking was required on account of the block of iron cast between two or four of the spokes of each wheel, called a counterpoise or balance; and that defendant Feeley was in charge of the lathe. The testimony is conflicting as to whether or not the work of moving the wheels by the wheel press gang on the occasion referred to was under the direction and supervision of defendant Feeley. Testimony was also given in regard to the appliances in use; but, as we view the case, it is needless to encumber this opinion with a recital thereof.

Plaintiff testified that they had brought the wheels from the track to the usual position in front of the lathe where they were

blocked preparatory to attaching the tackle necessary to raise the wheels into the lathe; that the counterpoise or weight was in a forward position when the wheels were so blocked; that a portion of this tackle was in a pit directly in front of the place where the wheels were stopped; and that it was a part of his duty to get down in the pit and take out the tackle; that he helped to block the wheels with the wooden blocks, placed as above described; that the block "was sufficient to hold the wheels if not removed"; that the pit was about eighteen inches deep, and that he was reaching down into the pit when injured. In describing the accident he said: "I got down sort of this way [indicating] to reach down into the pit in this position. When I was down in that position the wheels were just about there [indicating]. This was after the wheels had been blocked. While I was in this position Mr. Feeley said: 'All right boys,' and the blocks was kicked away and the wheels came rolling right onto my left leg. When I was in this position Mr. Feeley was standing in front at the side of the wheel that went over my leg, and just beside the block which was placed in front of the wheel. Some person kicked the block away that I had placed in front of the wheel. I did not see any other person near the block at the time than Mr. Feeley. At this time I was facing the lathe. I did not see Mr. Feeley kick the block. I was lifting the chains out at the time it was kicked. While I was in this position I heard a sound as if some one was ordering or saying all was right and a sound in the nature of a sort of a knock or shove as if the block was kicked along the floor, and just at that moment I received the injury." He stated several times during the course of his testimony that the blocks were sufficient to hold the wheels, and also stated that he had often gotten the chains from the pit, that he knew the wheels were very heavy, and that he had worked for three months in the shop. On cross-examination he testified: "After I was stooping down there I heard somebody say something; it was a sound of a voice; I simply heard somebody talk. It appeared to me like it was 'Go ahead, boys.' That was what I heard. Q. Who was it said that?

A. I don't— Mr. Feeley. Q. Well, how do you know it was Mr. Feeley? A. It was his orders. Generally he gave the orders. Q. Well, do you know that he gave them at that particular time? A. Yes, sir; because we were all under his orders and had to obey them. He gave them at that particular time. There was no one else to give orders. Q. Well, are you positive in what you heard that was said, or do you just think you heard somebody say something? A. No, sir; I don't think it." And again he said: "I heard the sound of a block kicked, but I didn't see anybody kick it. I heard the sound that somebody struck it with their toe." And again he said: "I have never known of the blocks coming out from under the wheels, and never known of the vibration of the shops to jar the blocks from under the wheels." He also testified: "Q. And you knew that if it rolled forward and your leg was in front of it, it would probably roll onto your leg, didn't you? A. Yes, and I knew it couldn't roll forward if it was blocked. I was sure that it was blocked before I got in that position." The accident was described as happening in about the same way, by the witness Polys. It is apparent from plaintiff's testimony that the wheels were taken from the track to the lathe in safety, and that little remained to be done but to attach the tackle and raise the wheels into position in the lathe.

It is urged by plaintiff that the defendant railway company was negligent in failing to provide reasonably safe appliances for doing the work, and that its failure to provide safer means than those in use at the time, to transfer the wheels from the track to the lathe, was the proximate cause of plaintiff's injury. The wheels had reached a position in front of the lathe, and were blocked to prevent them rolling either forward or backward. It is apparent, as testified to by plaintiff, that the accident could not have happened had the block not been removed from in front of the wheel. While the defendant railway company may have been negligent in failing to provide reasonably safe appliances for the plaintiff to do the work of moving the wheels—a question we do not now decide—yet such failure in

no wise contributed to plaintiff's injury. It was the negligent removal of the wooden block from under the wheel, permitting the wheel to roll on plaintiff, that was the proximate cause of the injury; no other conclusion can be drawn from the evidence.

It is not every negligent act that gives a cause of action; it is [2] only such neglect of duty as bears a direct, proximate, and causal relation to the injury. (*Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Andree v. Anaconda C. M. Co.*, 47 Mont. 554, 133 Pac. 1090.) This court has defined proximate cause as follows: "The proximate cause [3] of an injury is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, and without which the injury would not have occurred." (*Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189, 100 Pac. 971; *Therriault v. England*, 43 Mont. 376, 116 Pac. 581.) "It is a rule, so fundamental as to be axiomatic, • • • that before negligence, however [4] established, can become the basis of recovery, causal connection must be shown between it and the injury complained of." (*Westlake v. Keating Gold Mining Co.*, ante, p. 120, 136 Pac. 38.) In *De Sandro v. Missoula Light & Power Co.*, ante, p. 226, 136 Pac. 711, this court said: "It is not sufficient that the plaintiff prove the injury. It is necessary that he go further and show by some substantial evidence the causal connection between the negligence of the defendant and the injury; for the master cannot be held liable if his negligence was merely a condition, as opposed to the efficient cause of the injury. (Labatt on Master and Servant, 2d ed., sec. 1570; *Monson v. La France Copper Co.*, supra.) The efficient cause may be shown by indirect evidence, but it cannot be said to be established by such [5] evidence unless the circumstances are such that they not affirmatively to show it, but also tend to exclude any reason v. *La France Copper Co.*, supra; *McGowan v. Mont.* 67, 92 Pac. 40; *Shaw v. New Year Gold Mines* . 138, 77 Pac. 515.)"

Applying these principles to the present case, we conclude that the only ground of negligence, alleged by plaintiff and sustained by the evidence, which bore a causal connection with the plaintiff's injury, was the careless and negligent removal of the block of wood from in front of the wheel. The only logical inference that can be drawn from the testimony of plaintiff and his witnesses is that this obstruction to the movement of the wheels was removed by defendant Feeley or by his order, and that this was the proximate and sole cause of the injury. The appliances provided brought the wheels to the lathe in safety, and these appliances, whether safe or otherwise, or the failure of the defendants to provide other appliances, had no direct connection with the cause of plaintiff's injury. At the time plaintiff was injured, the work of moving the wheels to the lathe, for the time at least, had ended; so necessarily had ended the use of the appliances provided for such purpose. Had the block of wood not been removed, the accident could not have happened, and, as plaintiff testified, he could not have been injured. It is therefore apparent that the failure to provide different or safer means to move the wheels from the track to the lathe in no wise contributed to plaintiff's injury. It may be that some safer means might have been devised and put in use by the defendant company that would have lessened the probability of accident, but the law does not require the employer to select the safest appliances nor the best method for their operation. The employer is not an insurer, and absolute safety is unattainable; his duty is discharged when he furnishes the appliances in general use for the same purpose and operated in the same way by reasonably prudent and careful men under like circumstances. (*Kinsel v. North Butte Min. Co.*, 44 Mont. 445, 120 Pac. 797; *Gregory v. Chicago, M. & St. Paul Ry. Co.*, 42 Mont. 551, 113 Pac. 1123; *Cummings v. Reins Copper Co.*, 40 Mont. 599, 107 Pac. 904; *Southern Ry. Co. v. Lewis*, 110 Va. 847, 67 S. E. 357.) In this case it was not the failure to furnish reasonably safe appliances, but the misuse of the appliances provided, that caused the injury.

The jury were instructed that they were to consider the defendant Feeley as a fellow-servant of plaintiff; also, if they should find from the evidence that the defendant railway company had not in use at the place of the accident reasonably safe and suitable appliances or methods for doing the work, and if they should find that plaintiff's injuries were directly and proximately caused by the want of such safe and suitable appliances or methods, then the railway company would be liable even if they should also find that the negligent act of a fellow-servant aided or concurred in causing the injury. As has been shown, the proximate cause of plaintiff's injury was the negligent act in removing the obstruction from under the wheel; hence the failure to provide reasonably safe appliances had no causal connection with plaintiff's injury. Under the instructions the jury should have returned a verdict for the defendants. The court's order setting aside the verdict was therefore justified.

Respondents insist that plaintiff assumed the risk of such an injury when he entered defendant company's employ, and for that reason cannot recover in any event. It cannot be said that the careless and negligent removal of the block of wood from under the wheel was one of the risks of the business assumed by the plaintiff. But respondents urge that plaintiff assumed the risk of injury resulting from the negligence of fellow-servants, and that, as the injury was the result of the negligence of a fellow-servant, plaintiff cannot recover. While it is true that plaintiff assumed the risk of injury from negligence of fellow-servants, under the evidence it cannot be said, as a matter of law, that defendant Feeley was the fellow-servant of plaintiff. We think there was sufficient conflicting testimony as to the character of the employment, the duties and authority of Feeley, to raise a question for the jury, and that this question should have been submitted to the jury under proper instructions.

trial, should the jury find that Feeley was the
of plaintiff, the verdict would necessarily be that
company is not liable for plaintiff's injuries. On
should the jury believe the plaintiff's story and

find that Feeley was a vice-principal of defendant company, and not a fellow-servant of plaintiff, and that plaintiff was not guilty of contributory negligence, then the verdict would necessarily follow for plaintiff.

The order granting a new trial is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

CONROW, APPELLANT, v. HUFFINE ET AL., RESPONDENTS.

(No. 3,342.)

(Submitted January 6, 1914. Decided January 26, 1914.)

[138 Pac. 1094.]

*Water Rights—Extent of Right—Duty of Water—Estoppel—
Pleading—Waiver—Implied Findings—Record on Appeal—
Bills of Exception.*

Water Rights—Implied Findings.

1. In a water right suit the presumption will be indulged, under the doctrine of implied findings, that the court found in favor of the prevailing party upon all the issues not covered by the express findings.

Same—Extent of Right—How Measured.

2. While, as between claimants under prior and subsequent appropriations of water, the extent of the right of the first appropriator is measured by the capacity of his original ditch, the necessity for the use, and not the size of the ditch, is the measure of the extent of the right after the use has been installed and the capacity of the ditch exceeds the amount required for reasonable use.

[As to appropriation of water for irrigation purposes, see notes in 98 Am. Dec. 542; 20 Am. St. Rep. 225. As to what constitutes an appropriation of water, see note in 60 Am. St. Rep. 799.]

Same—Duty of Water—Rule.

3. In the absence of legislative declaration on the subject, the rule in fixing the amount of water required for economical use for purposes of irrigation is to allow one inch per acre, unless the evidence discloses that a greater or less amount is required.

Same—Allowance of Water—Convenience—Immaterial Consideration.

4. That a larger allowance of water than one inch per acre would more readily and conveniently enable a party to accomplish his work of irrigation is not any reason for making a larger award.

Same—Acquisition of Rights—Extent, How Measured.

5. The extent of a right to the use of water acquired by purchase or otherwise is dependent upon the extent of the right at the time of its acquisition.

Estoppel—Pleading—Waiver.

6. Unless conduct claimed as an estoppel is pleaded as such, it will be held to have been waived.

Findings—Evidence—Sufficiency—Review—Bill of Exceptions.

7. The sufficiency of the evidence to justify findings in a water right suit may be raised on motion for a new trial and reviewed on appeal without formal exceptions, the law (Rev. Codes, sec. 6784) reserving an exception for that purpose; hence a formal bill of exceptions was not required.

Appeal from District Court, Gallatin County; J. M. Clements, a Judge of the First Judicial District, presiding.

ACTION by S. H. Conrow against Franz Huffine and others. Decree for defendants, and plaintiff appeals. Remanded, with directions.

Mr. Walter Aitken, for Appellant, submitted a brief and argued the cause orally.

After diligent search and study we have been unable to find any specific declaration of this court as to the duty of water in any given instance. General rules have been laid down in many cases by which this court has recognized the principle that need is the basis of right, and that need is a matter of evidence. However, in *Toohy v. Campbell*, 24 Mont. 13, 60 Pac. 396, it seems to have been decided that fifty inches of water is irrigate twenty-five acres of land, the opinion not that there was any evidence as to the needs of the court apparently basing its decision on common. That decision was rendered more than thirteen years ago. And in the recent case of *Bailey v. Tintinger*, 45 Mont. 22 Pac. 575, the rule is laid down that "the appropriator's needs and facilities, if equal, measure the extent of his right. If his needs exceed the capacity of his means then the capacity of his ditch, etc., measures the extent of his right. If the capacity of his ditch exceeds his needs his needs measure the limit of his appropriation."

In the case at bar the capacity of the ditch supplying the Moore place is far greater than the need for water of the land covered. Hence, need is the measure of the right. All of the testimony in the record except Mr. Gee's is to the effect that an inch to the acre is sufficient for this land, provided one has sufficient to make an irrigating head, and this court seems to have recognized this as a general fact of common knowledge in *Toohey v. Campbell*, above, that fifty inches is an irrigating head and if this was true thirteen years ago it is, for a greater reason, true now, under the improved systems of irrigation, and the need for economy in the use of water under greatly increased demand. To warrant any greater award the need must be exceptional and established by specific, abundant, clear and convincing proof. The decided preponderance of the evidence negatives any such exceptional need in the case at bar. In other jurisdictions there is abundant and specific authority for limiting irrigation rights to actual need measured by rules established from long experience, and the tendency everywhere is to frown upon and discourage wasteful methods of irrigation. "Advance in methods of irrigation, and increase in number of users, must be considered in deciding the requirement for beneficial use, and thereby the extent of the appropriation." (1 *Wiel on Water Rights*, 3d ed., 510; *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; *Farmers' Co-operative Ditch Co. v. Riverside Irrigation Dist.*, 16 Idaho, 525, 102 Pac. 481; *Larimer County Canal etc. Co. v. Poudre Valley R. Co.*, 23 Colo. App. 249, 129 Pac. 248.)

Mr. John A. Luce, and *Mr. George D. Pease*, for Respondents, submitted a brief; *Mr. Luce* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to have determined the extent of the respective rights of the plaintiff and the defendants to the use of the water flowing in Bear creek, in Gallatin county, and the

order of their priorities. The stream is formed by two branches, which are referred to in the pleadings and evidence as the east and west forks. The former has its source in the northeast quarter of section 28, township 2 north, range 5 east, and the latter in the southeast quarter of section 21, same township and range. After flowing south through section 33, the branches unite in section 4, township 1 north, range 5 east, forming the main stream, which flows thence toward the southwest through sections, 5, 8 and 7. The defendants Gervais, Merritt, Ballard, and Brownell, though served with summons, did not appear. Plaintiff is the owner of sections 21 and 28 and at different times has had under irrigation, from Bear creek and other sources, about sixty-eight acres, consisting of the areas of lowlands lying along both branches of the stream. The lands owned by the defendant Gee consist of 200 acres, lying in sections 33 and 4 above the junction of the two branches. Not more than sixty-five acres of them are susceptible of irrigation from Bear creek. At the time of the trial the area under irrigation was about forty-five acres. Defendant Beckhorn owns about eighty acres, lying partly above and partly below the junction. At the time of the trial he had under irrigation from Bear creek about nine acres, though there is an additional area of twenty acres susceptible of irrigation, when he has a sufficient supply of water. The defendant Huffine's lands lie on both sides of the main stream below the junction, in sections 7 and 8. The areas under irrigation by him at the time of the trial covered about fifty-six and a half acres. The plaintiff claims the right to the use of 100 inches, appropriated and diverted by his predecessors or himself from the two branches at different times from October 1, 1877, to July 1, 1885. The defendant Huffine dates his right from May 1, 1868. The appropriation under which he claims, and which is referred to in the record as the Moore right, was made by the construction of a ditch on the east bank of the main stream in May, 1868, by a predecessor who had made settlement upon a portion of the lands now owned by this defendant. The water was first diverted and used to irrigate lands on the east

side of the stream. In all there were about thirty-six acres, including an area of a little more than fourteen acres, which is not now owned by Huffine. Subsequently, but prior to the spring of 1878, the exact date not being disclosed, a second ditch was taken out on the west side by a mesne grantee of the original appropriator. This was used to convey water to all the irrigable lands now owned by Huffine on the west side, amounting approximately to thirty-four acres. The defendants Gee and Beckhorn claim under the same appropriation, alleging interests therein by mesne conveyances from the original appropriator. They also claim under other appropriations made by themselves on July 1, 1885. At the trial the plaintiff conceded the priority of defendants' rights, so far as they appeared to have been derived from the Moore right, and there is a present necessary use for the water diverted by it, but endeavored to show that the actual necessity served by this right at any time prior to plaintiff's oldest appropriation required a much smaller amount than the defendants claimed. The court made special findings of the amounts and dates of all the respective claims and entered a decree accordingly. It found that the appropriation of May 1, 1868, amounted to ninety inches; that the defendants are the owners of this right in undivided interests as tenants in common, Huffine having one-half, Gee one-third, and Beckhorn one-sixth; and that they are entitled to use, respectively, forty-five, thirty and fifteen inches. The plaintiff has appealed from the decree and an order denying his motion for a new trial.

No complaint is made of the findings touching the claims of any of the parties other than those based on the Moore right. As to these, complaint is made that the total amount awarded to the defendants is in excess of that actually needed for their efficient use at the time the appropriation was made, or thereafter, at any time prior to the date of plaintiff's appropriations. Counsel contends that the evidence is insufficient to justify the findings in this regard. Whether this contention has merit is the only question he has submitted for decision.

There is no controversy in the evidence that at ordinary stages during the irrigating season the flow of the stream does not exceed 100 inches. Nor is there any question that the ditch taken out in 1868 diverted substantially the entire flow. The same may be said of the west side ditch. The area irrigated on both sides did not at any time, prior to plaintiff's earlier appropriations, exceed approximately seventy acres. This area was never increased, because it included all the lands susceptible of irrigation from the stream on either side of it. Plaintiff made appropriations in 1878, 1879 and 1882, amounting in all to thirty-five inches. When Huffine acquired his interest in the Moore right does not appear. He never acquired more than an undivided one-half interest. On February 25, 1899, Moore conveyed to one Axtell an undivided one-half interest. This interest was subsequently acquired by the defendants Gee and Beckhorn, the former acquiring an undivided one-third and the latter an undivided one-sixth interest. The findings are silent as to the date of the construction of the ditch on the west side of the stream to utilize the Moore right on the lands on that side. Counsel, therefore, argues that, since this is so, the use of any water on that side under the Moore right was excluded from consideration, and that, while the court properly awarded to defendants the proportionate amounts they are entitled to, the gross amount is too large because the evidence clearly discloses that the Moore right was never used to irrigate to exceed thirty-six acres on the east side. To make the statement in another way: Since under the findings the Moore right should have been limited in amount by the necessity for its use on the lands on the east side only, and, since the extent of the defendants' respective interests must be determined by the extent of this use, the total amount found for all these rights, after making due allowance for a sufficient head to render the use effective, should have been limited to forty or fifty inches. Again he says: Conceding that the total amount of the awards made to the defendants should be limited to the necessary use of the Moore right on both sides of the stream, the award is nevertheless ex-

cessive because it appears without controversy that at no time in the history of the Moore right could there have been actual necessity for the use of more than sixty inches, because all the lands irrigated by it never exceeded, or could have exceeded fifty-six and a half acres; one inch per acre being the average amount required to irrigate any of the lands upon which the water has heretofore been used.

We do not think the silence of the findings touching the west side ditch is to be given the significance claimed by counsel. The court, in finding as it did that Huffine is entitled to the use of forty-five inches, evidently took into consideration the gross amount of land susceptible of irrigation on both sides of the stream; otherwise the finding that the extent of the Moore right was ninety inches cannot be explained. For it may not be supposed that the court entertained the notion that this amount was ever necessary to irrigate the comparatively small area of thirty-six acres on the east side. In any event, under the doctrine of implied findings, nothing appearing to require the contrary conclusion, the presumption will be indulged that the court found in favor of the Moore right upon all the issues in this connection not covered by the express findings. (*Yellowstone Nat. Bank v. Gagnon*, 25 Mont. 268, 64 Pac. 664.) The right to use water on all his irrigable lands on both sides of the stream is alleged affirmatively by Huffine in his answer, and evidence was offered showing that he had necessity for such use. Under these circumstances, we must presume that the amount found for the Moore right, out of which have been acquired the respective rights of the defendants, was fixed in view of the necessity existing for its use at the time the appropriation was made, including also the subsequent enlargement of the use by the application of it to the lands on the west side of the stream.

“The test of the extent of an appropriation with reference to a subsequent right to the waters of a stream is dependent upon the capacity of the first ditch before such subsequent appropriation is made. When an owner or possessor of land

makes an appropriation of water in excess of the needs of the particular portion of the land upon which he conveys the water, and other portions of his land also require irrigation, his water right is not limited by the requirements of the particular fraction. He may still, despite the fact that another's water right has attached, construct other ditches through his remaining land, provided that the total amount of water conveyed by all the ditches on his place does not exceed the original capacity of the first ditch. As between his appropriation and the subsequent [2] water right, the capacity of the ditch, by means of which he first made his appropriation, is the test of the extent of it." (*McDonald v. Lannen*, 19 Mont. 78, 47 Pac. 648.) Under this rule, the extent of the right of the first appropriator is measured by the capacity of the original ditch. After the use has been installed, however, if the capacity of the ditch exceeds the amount required for reasonable use, the necessity for the use, and not the size of the ditch, is the measure of the extent of the right. (*Toohey v. Campbell*, 24 Mont. 13, 60 Pac. 396; *Bailey v. Tintinger*, 45 Mont. 154, 122 Pac. 575.) The tendency of recent decisions of the courts in the arid states is to disregard entirely the capacity of the ditch and regard the actual beneficial use, installed within a reasonable time after the appropriation has been made, as the test of the extent of the right. (1 *Wiel on Water Rights*, sec. 476; *Barrows v. Fox*, 98 Cal. 63, 32 Pac. 811; *Roeder v. Stein*, 23 Nev. 92, 42 Pac. 867; *Drach v. Isola*, 48 Colo. 134, 109 Pac. 748; *Larimer County Canal No. 2 Irr. Co. v. Poudre Valley R. Co.*, 23 Colo. App. 249, 129 Pac. 248; *Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 102 Pac. 481; *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 1102, 102 Pac. 728.)

The use of water flowing in the streams of this state is declared by the Constitution to be a public use. (Constitution, Art. III, sec. 15.) The use must be beneficial, and, when the appropriator or his successor ceases to use the water for such purpose, the right ceases. (Rev. Codes, sec. 4841.) If conditions change as time passes, and the necessity for the use diminishes, to the extent of

the lessened necessity the change inures to the benefit of subsequent appropriators having need of the use, for, subject to the rule that "as between appropriators the one first in time is first in right" (sec. 4845), the prior appropriator may not divert from the stream more than an amount actually necessary for his use (sec. 4844). While, therefore, the extent of the right cannot in any case exceed the capacity of the means of diversion, the ultimate question in every case is: How much will supply the actual needs of the prior claimant under existing conditions?

As has already been said, the Moore right has never been used to irrigate more than approximately seventy acres, this area embracing all the Huffine lands that can be irrigated. Ordinarily the area to which it has been applied has not exceeded approximately fifty-six acres. This is not controverted; nor is it controverted that the soil of these lands consists of a fine black loam, which ordinarily requires a smaller allowance of water than any other. Touching the amount per acre necessary for effective use, the evidence is not very definite. The defendants testified generally that they had been using the Moore right alternately, and that it has required the entire flow of the stream to irrigate their lands. These statements cannot be accepted as of substantial value, when we remember that Beckhorn has never at any time had under cultivation more than twenty-nine acres. According to the opinion of these witnesses, three inches per acre are required for effective use on Beckhorn's land, and a proportionately large amount per acre on the lands of the other defendants. The only definite statement made on the subject by any witness was that of the plaintiff, who said that, making due allowance for a sufficient head to insure effective irrigation, and considering the character of the soil of Huffine's land, one inch per acre was all that was required. It is not clear whether, in finding the amount of the Moore right, the court accepted the statement of the defendants or made the capacity of the original Moore ditch the measure.

While we have no legislation on the subject, the rule has generally been observed by the courts of this state, in fixing the

[3] amount required for economical use, to allow one inch per acre, unless the evidence discloses that a greater or less amount is required. All the witnesses who testified on the subject agreed that fifty or sixty inches furnish a sufficient head for effective working purposes. If this is true, and one inch per acre is all that is required, the award made by the court was excessive from any point of view, under the circumstances disclosed by the evidence; and, in view of the rule referred to, we think the court should have accepted the statement of plaintiff as the only substantial evidence on the subject. From this point of view, making the most liberal allowance for the Moore right, the total award should have been fixed at seventy inches, or one inch per acre, for the largest area ever irrigated by it. That the Beck-

[4, 5] horn and Gee lands have need for a larger allowance, because of their character or for any other reason, may not be considered as important, because the extent of their rights depends entirely upon the extent of the Moore right at the time they acquired their interests. While it may be conceded, as all the defendants testified, that the amount awarded by the court would enable them to accomplish their work of irrigation more readily, since one inch per acre must be deemed sufficient for practical purposes for lands of the character for which the appropriation was made, defendants may not claim, or be allowed, a larger allowance merely because it will more conveniently serve their wants.

In 1889 one Axtell was occupying the lands now owned by Beckhorn and Gee. An action was brought against him by Moore to enjoin him from interfering with the Moore right by diverting water for use on the Beckhorn and Gee lands. Moore claimed that he was entitled to the exclusive use of all the water in the stream. Axtell suffered default, and the result was a decree in Moore's favor, adjudging him entitled to the relief demanded. In the present action Moore, who testified for the defendants, stated that, prior to the bringing of that action, he saw the plaintiff and told him that he (Moore) was disposed to make him a defendant; that plaintiff thereupon told him that

he should not do so, for the reason that plaintiff put more water into Bear creek than he took out; and that for this reason plaintiff was not made a defendant. The witness explained that plaintiff's claim was that by allowing a sufficient volume of waste water to flow into the east branch of Bear creek from a ditch used by him to divert water from Cottonwood creek, which lies some distance to the east, to maintain undiminished the volume of water flowing to the head of Moore's ditch, he was not interfering with Moore's right. The plaintiff denied that this conversation ever occurred. Counsel for defendants contend that by his failure at that time to assert a right to divert and use water from Bear creek, and by his acquiescence in the result of the action since that time, plaintiff is estopped to question the extent of Moore's right. That the plaintiff is not to be held bound by the judgment is clear, because he was not a party to it. (Rev. Codes, sec. 7914.) If it be conceded that his conduct [6] was such as to estop him, the defendants did not plead it as an estoppel, and hence must be held to have waived their right to rely on it. (8 Cyc. Pl. & Pr. 10, 13.)

Counsel also contend that the findings are not properly before the court for review, because plaintiff did not have a formal bill of exceptions settled under the provisions of sections 6767 and 6768 of the Revised Codes. These provisions point out the procedure to be observed in preparing bills of exceptions when the court refuses to remedy defects in the findings upon application made in that behalf. The findings as made constitute a part of the judgment-roll (section 6806), and the sufficiency of the evidence to justify them may be questioned on the motion for a new trial, and reviewed by this court on appeal, without formal [7] exceptions, the same as the verdict of a jury. For this purpose the law reserves an exception, and no formal bill of exceptions is required. (Rev. Codes, sec. 6784.) Sections 6767 and 6768 have no application.

The cause is remanded to the district court, with directions to set aside the decree heretofore entered, to amend the finding as to the amount of the Moore right by fixing it at seventy inches,

to award to each of the defendants his undivided interest in this amount, and to enter a decree accordingly. Each party will pay his own costs.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

VANDERPOOL, RESPONDENT, v. VANDERPOOL, EXECUTRIX,
APPELLANT.

(No. 3,327.)

(Submitted January 7, 1914. Decided January 26, 1914.)

[138 Pac. 772.]

*Estates of Deceased Persons—Claims Against—Presentation—
Executors and Administrators—Statutes—Variance—Fail-
ure of Proof—Waiver—Estoppel.*

Estates—Claims Against—Presentation—Statutes—Failure of Proof.

1. A claim against an estate founded upon a note or other instrument in writing must, under section 7529, Revised Codes, be accompanied by a copy of it, or, if the original be lost or destroyed, an affidavit must be appended stating such fact, and containing a copy of description of the writing. Under section 7532, the holder of such a claim cannot maintain an action on it unless the very claim sued upon has first been presented to the executor or administrator. While a claim presented to defendants as executrix did not purport to be based upon a promissory note, the complaint alleged, and the evidence showed, that it was. *Held*, that there was such a variance as amounted to a failure of proof.

[As to statement of claims in their presentation against the estate of decedent, see note in 130 Am. St. Rep. 311.]

Same—Complaint—When Insufficient.

2. A complaint in an action to recover on a claim against an estate fails to state a cause of action unless it expressly alleges that the claim as made was first duly presented to the executor or administrator.

Same—When Action will not Lie.

3. Statutes such as section 7525, Revised Codes, providing that claims against estates upon causes of action which sound in contract are barred unless presented within the time limited in the notice for their presentation, supersede the general statutes of limitations and compliance with their terms is essential to the maintenance of actions thereon.

Same—Presentation of Claim—Executors and Administrators—Attorneys—Waiver—Estoppel.

4. Neither an executor or administrator, nor an attorney for the estate, can waive any substantial right affecting the interests of the

heirs or creditors, nor can either be estopped by his conduct to their prejudice; hence an executrix was not estopped to contest a claim because of alleged misleading statements and assurances made by the attorney of the estate, which induced the claimant to omit compliance with the provisions of the statute prescribing the manner of presenting the claim.

Appeal from District Court, Sanders County; R. Lee McCulloch, Judge.

ACTION by Mrs. A. C. Vanderpool against Elizabeth A. G. Vanderpool, as executrix of Samuel L. Vanderpool, deceased. Judgment for plaintiff, and defendant appeals from it and an order denying her a new trial. Reversed and remanded.

Messrs. Tolan & Gains, and Mr. H. J. Burleigh, for Appellant, submitted a brief; Mr. R. F. Gaines argued the cause orally.

We contend that a compliance with the requirements of section 7529, Revised Codes, demands that inasmuch as the foundation of the cause of action prosecuted by respondent was a promissory note, it was necessary for her to plead facts showing that the claim she presented was such a claim as the statute demands. The allegations in the complaint in this respect are insufficient to state a cause of action.

It certainly must appear that the claim sued on is the identical claim which was presented against the estate. (*Brown v. Daly*, 33 Mont. 523, 84 Pac. 883.) And as the right and the mode of recovery are provided by statute, the statute must be followed in order for a plaintiff to prevail; the pleadings and proof must bring such plaintiff within the statute. (*Menard v. Montana Cent. Ry. Co.*, 22 Mont. 340, 56 Pac. 592.)

This court has apparently never passed upon the question of the sufficiency of the presentation of a claim which is in fact founded upon a note, but which has not accompanying the claim a copy of the note or an affidavit explanation of its loss or destruction. In the case of *Dorais v. Doll*, 33 Mont. 314, 83 Pac. 884, it, however, gives implied approval to the contention that such a presentation is not sufficient. In Missouri there is found a pro-

vision somewhat similar to section 7529, *supra*. In the case of *Waltemar v. Schnick's Estate* (*Woltemahr v. Doye*), 102 Mo. App. 133, 76 S. W. 1053, it is said: "The exhibition of plaintiff's claim to defendant did not contain a copy of the note (the instrument of writing upon which her claim is founded) and for this reason was wholly insufficient under the statute." Again, in the case of *Britian v. Fender*, 116 Mo. App. 93, 92 S. W. 179, the same court held that compliance with the provisions of their section was jurisdictional, and if a claimant failed to follow any one of the required steps no jurisdiction of the cause was acquired by any court. Announcing the same general principle as stated in *Brown v. Daly*, *supra*, we find decisions from California, as follows: *Etchas v. Orena*, 127 Cal. 588, 60 Pac. 45; *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466; *Morehouse v. Morehouse*, 140 Cal. 88, 73 Pac. 738. And construing a section of the California Codes which is practically identical with section 7529, *supra*, we find decisions as follows: *Bank of Sonoma County v. Charles*, 86 Cal. 322, 24 Pac. 1019; *In re Turner's Estate*, 128 Cal. 388, 60 Pac. 967.

That in cases of this character more satisfactory proof is required than in the ordinary action, it not being permitted to introduce testimony with reference to declarations of a deceased person of a self-serving character and wherein the evidence is almost entirely within the control of the plaintiff, see *Holmes v. Connable*, 111 Iowa, 298, 82 N. W. 780; *Wallace v. Rappleye*, 103 Ill. 229; *Graham v. Graham's Exrs.*, 34 Pa. 481; *Brewer v. Hieronymus*, 19 Ky. Law Rep. 645, 41 S. W. 310; *Rosseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916; 18 Cyc. 530.

No appearance in behalf of Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The following promissory note is copied into the complaint and made the basis of plaintiff's cause of action:

“July the 15, 1908.

“I promise to pay to Mrs. A. C. Vanderpool one thousand dollars, \$1,000, in three years from date, at 6 per cent interest.

“S. L. VANDERPOOL.”

It is alleged that S. L. Vanderpool died testate on June 19, 1911; that the defendant is the duly appointed executrix of his last will and testament; that on August 26, 1911, plaintiff presented her claim for the amount then due on said note, which claim was rejected; and that the plaintiff is now the owner and holder of the note, no part of which has ever been paid. The answer denies the execution or delivery of the note, or any indebtedness due from the deceased to the plaintiff, and denies that any claim for the debt sued upon was ever presented to the executrix. It is further alleged affirmatively that plaintiff's cause of action, if any she ever had, is barred by the provisions of section 7525, Revised Codes. The reply is a general denial of the new matters contained in the answer. Upon the trial of [1] the cause plaintiff testified to the facts and circumstances surrounding the execution and delivery of the note; that no part of the debt evidenced by it had ever been paid, and that about August 17, 1911, she went to the office of Mr. H. J. Burleigh, attorney for the estate, which office was designated in the notice to creditors as the place for the presentation of claims against the estate; that she was informed by Mr. Burleigh that he was the attorney for the estate, and as such could not act as her attorney in preparing her claim in statutory form, but that as a mere matter of accommodation and gratuitously he would prepare her claim for her; that he did prepare *a claim*; and that she verified it and left it with him, and in a short time thereafter was notified that it had been disallowed and rejected. As to what further took place in Mr. Burleigh's office at that time, the witnesses speak for themselves. Plaintiff testified that she informed the attorney that her claim was founded upon a promissory note, but that the note had been mislaid and she could not find it at that time; that shortly after her claim was rejected she found the note, a copy of which is set forth above, and notified

Mr. Burleigh of the fact: that he came to her house, secured the note, and after keeping it a day or more, returned it to her, with the assurance that she would have no trouble getting her money. Mr. Burleigh testified that when the plaintiff came to his office and asked him to prepare her claim in statutory form, he inquired of her particularly whether she had any note or other writing evidencing the debt: that she informed him that she did not have, and that it was after the claim was rejected, and after plaintiff had been notified, that she then informed him for the first time that she had a note, and that he told her if it was all right she would doubtless receive her money without trouble. Much of the time of the trial was devoted to receiving evidence touching the genuineness of the signature to the note sued upon. The trial resulted in a judgment in favor of plaintiff, and from that judgment and an order denying a new trial, the defendant has appealed.

We have omitted all references to those portions of the evidence which tend to weaken the plaintiff's case as exhibited under the view most favorable to her, as well as all references to testimony tending to defeat her claim or to corroborate Mr. Burleigh. For the purposes of this appeal we may assume that the jury found specifically that plaintiff's version of her transactions with the attorney is correct, and that the evidence is sufficient to sustain that finding. Section 7529, Revised Codes, in treating of claims for presentation against an estate, provides: "If the claim be founded upon a bond, bill, note or other instrument, a copy of such instrument must accompany the claim, and the original must be exhibited if demanded, unless it be lost or destroyed, in which case the claimant must accompany his claim with his affidavit containing a copy or particular description of such instrument, and stating its loss or destruction." Compliance with these provisions involves no difficulty, and a court cannot say that anything less than substantial compliance upon the part of the claimant meets the requirements. It is not within the power of a court either to repeal or amend this section. The only claim which was presented by the plaintiff against this estate, omitting merely formal portions, reads as follows:

“Estate of Samuel L. Vanderpool, Deceased, to Caroline E. Vanderpool, Dr.

“1908, July 15. To money loaned deceased to be repaid in 3 years with interest at the rate of 6 per cent per annum. \$1,000 00
Interest from July 15, 1908, to August 15, 1911 185 00

Total amount due to August 15, 1911 \$1,185 00”

This does not purport to be founded upon any instrument in writing. It does not contain any copy, and neither was it accompanied by an affidavit containing a copy or a particular description of any instrument, or any statement that the instrument upon which the claim was founded had been lost or destroyed. The statute further provides: “No holder of any claim against an estate shall maintain any action thereon, unless *the claim* is first presented to the executor or administrator.” (Sec. 7532, Rev. Codes.) The only exception to this rule is in favor of one whose claim is secured by mortgage or lien, and who does not seek a deficiency judgment against the estate. What claim is it which must be presented under this section? The identical one sued upon. A party cannot present a claim founded upon an open account and then maintain an action upon a promissory note, or *vice versa* (*Brown v. Daly*, 33 Mont. 523, 84 Pac. 883; *Waltemar v. Schnick's Estate* (*Woltemahr v. Doye*), 102 Mo. App. 133, 76 S. W. 1053); and, if he attempts to do so, the result is such a variance as amounts to a failure of proof. (*Etchas v. Orena*, 127 Cal. 588, 60 Pac. 45.)

So imperative is the statute above that, in the absence of an [2] express allegation that the plaintiff duly presented the claim sued upon, the complaint fails to state a cause of action altogether. (*Fratt v. Hunt*, 108 Cal. 288, 41 Pac. 12; *Morse v. Steele*, 149 Cal. 303, 86 Pac. 693; 18 Cyc. 991.) Plaintiff apparently appreciated this rule, for in her complaint she alleges due presentation of her claim founded upon the note above;

her proof, however, fails to sustain her pleading. She has not appeared in this court at all, and we are not aided by any brief submitted in her behalf.

We infer from the record, however, that the trial court proceeded upon the theory that if plaintiff was led into error in [3] filing her claim, by the attorney for the estate, the estate itself is estopped to deny that the claim was presented as required by law. Section 7525, Revised Codes, provides that: "All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever." These statutes of nonclaim are special in character; they supersede the general statutes of limitations, and compliance with their requirements is essential to the foundation of any right of action against an estate upon a cause of action which sounds in contract. The executor or administrator is in effect a trustee of the funds of the estate for the benefit of the creditors and heirs, and cannot waive any substantial right which materially affects their interests, and, for the same reason, cannot be estopped by his own conduct. He cannot, by failure to plead the statute of nonclaim as against one who sues upon a claim which has not been properly presented, preclude the heirs or other creditors of the estate from setting it up upon settlement of his accounts (*In re Mouillerrat's Estate*, 14 Mont. 245, 36 Pac. 185), and he renders himself personally liable for *devastavit* in case of payment of such a claim. While an equitable estoppel might be invoked as against an executor or administrator so far as his individual interest in the estate is concerned, it cannot operate to the prejudice of the heirs or other creditors. Even his misleading statements, his assurances or his conduct which induces a creditor to omit compliance with the statute, will not operate to estop him from contesting the claim upon the ground of noncompliance. The reason for these rules ought to be manifest at once, and with reference to them there is substantial unanimity of opinion among the authorities. (2 Woerner's

American Law of Administration, sec. 387; *Kells v. Lewis*, 91 Iowa, 128, 58 N. W. 1074; *Spaulding v. Suss*, 4 Mo. App. 541.)

In *Nagle v. Ball*, 71 Miss. 330, 13 South. 929, the court said: "The administrator cannot waive the absolute bar created by statute for the protection of estates of decedents. He cannot abrogate a positive rule of law requiring probate of claims within the prescribed period by conduct of his own, however misleading or designing. The creditors were bound to obey the plain requirements of the statute. They, as all others, were supposed to know the law prescribed for their guidance. But if they did not, and the administrator advised or induced them to omit to probate their claims, * * * where is the authority to be found for exempting them from the operation of a positive statute which is universal in its application?"

If the estate would not have been bound by the same representations as are alleged to have been made by Mr. Burleigh, if they had been made by the executrix, for the stronger reason it was not estopped by the acts of the attorney, who has no authority whatever in passing upon claims, or in allowing or rejecting them.

In failing to present the identical claim sued upon, plaintiff has suffered the penalty provided in section 7525 above, and we cannot change that statute in order to relieve her from the hardships, if any, which this conclusion imposes. If she has any cause of action which she can now assert, it must be one against Mr. Burleigh and not against this estate.

For the reason that the evidence fails to support the verdict, the judgment and order are reversed, and the cause is remanded, with directions to dismiss the complaint.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE, APPELLANT, v. HARPER, RESPONDENT.

(No. 3,333.)

(Submitted January 9, 1914. Decided January 26, 1914.)

[138 Pac. 495.]

Criminal Law—"White Slave" Act—Females—Transportation for Immoral Purposes—Interstate Commerce—Jurisdiction.

1. Since Congress has exclusive jurisdiction to regulate interstate commerce; since the transportation of passengers from one state to another is interstate commerce, and since by the Mann Act (Chap. 395, 36 U. S. Stat. 825) the Congress has assumed to regulate the transportation of females from one state to another for immoral purposes, the state legislature had no power to enact a provision covering the same subject-matter, and therefore section 1, Chapter 1, Laws of 1911, is inoperative, and the district court properly sustained a demurrer to an information charging defendant with a violation of section 1 of such Act.

[As to validity of federal "White Slave Traffic Act," see note in Ann. Cas. 1913E, 909. As to construction of such Act, see note in Ann. Cas. 1913E, 913.]

Appeal from District Court, Park County; Albert P. Stark, Judge.

PETER HARPER was informed against for aiding a woman in obtaining transportation from Minnesota to Montana for an immoral purpose. A demurrer having been sustained to the information and defendant discharged, the state appeals. Affirmed.

Cause submitted on brief of counsel for Appellant, *Mr. D. M. Kelly*, Attorney General, and *Mr. J. H. Alword*, Assistant Attorney General.

As contended by defendant below, it has even been held that Congress has plenary power over the subject of interstate commerce and that laws enacted by it are supreme. (*McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; *Smith v. State of Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. Rep. 564; *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (n. s.) 257, 33 Sup. Ct. Rep. 148; *Chicago etc. Ry. Co. v. Miller*, 226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. Rep.

155; *Smith v. Turner*, 7 How. (U. S.) 287, 12 L. Ed. 703.) Nor can it be denied that the transportation of passengers is interstate commerce and, therefore, subject to regulation by Congress. However, all of these cases recognize the police power reserved to the states, the power to enact laws for the preservation of the health, property and morals of their citizens. (*Smith v. Turner, supra.*) In *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819, it is said: "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, morals and safety of their citizens, though the legislation might indirectly affect the commerce of the country." Other cases adopting this same view are: *Austin v. State of Tennessee*, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. Rep. 132; *Plumley v. Commonwealth of Massachusetts*, 155 U. S. 461, 39 L. Ed. 223, 15 Sup. Ct. Rep. 154; *Geer v. State of Connecticut*, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600.

The broad general line of division between federal and state jurisdiction is "based upon the principle of national control of every subject affecting the country and the people as a whole and wherein uniformity of rule and control is desirable, if not indispensable, and of state control over subjects of local interest." (*Murray v. Chicago etc. R. Co.*, 62 Fed. 24.)

The state law called in question here is a prohibition upon the residents of this state to do certain things inimical to the health and morals of this state, in other words an exercise of the police power which may in an indirect fashion affect interstate commerce. But as seen by the numerous cases cited, it is a legitimate exercise of the legislative functions of this state and not necessarily an interference with interstate commerce, even though it might indirectly affect it. Nor can it be said that it is such a subject as of necessity requires exclusive national jurisdiction, regulation and control. It is essentially as much a matter of local interest as the liquor traffic, the drug traffic, or the tobacco traffic, and it is also as essentially a matter of interstate commerce as the transportation of these various com-

modification is, and the supreme court of the United States has held local regulations in these matters to be valid. (*Austin v. State of Tennessee*, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. Rep. 132.)

The argument advanced that this court has, in the case of the *State v. Northern Pacific Ry. Co.*, 36 Mont. 582, 13 Ann. Cas. 144, 15 L. R. A. 'n. s.; 134, 93 Pac. 945, indicated that a federal law upon the same subject as a state law would entirely abrogate the state law, is not substantiated by a careful reading of that decision, for the reason that the court did not at that time have before it the question of the validity of a state law upon a topic upon which the federal government had previously enacted a law, both being operative at the same time, and for the further reason that the only question which could have arisen in that case was whether the state had a right to regulate the relations of the carrier and its agents, a different question from the one involved here.

MR. JUSTICE SANNER delivered the opinion of the court.

By an information filed in the district court of Park county, the respondent, one Peter Harper, was accused of aiding a woman in obtaining transportation from Woodlake, Minnesota, to Livingston, Montana, for the purpose of concubinage, contrary to the provisions of section 1, Chapter 1, Laws of the Twelfth Legislative Assembly (Laws 1911, p. 3). To this information the respondent demurred, principally upon the ground that the court was without jurisdiction. The demurrer was allowed and, because the objection could not be avoided by another or amended information, the respondent was discharged. From the judgment thus entered, the state has appealed.

In ruling upon the demurrer the learned judge of the district court filed a memorandum which, omitting the formal parts, is as follows:

"The law under which this information is drawn was passed [1] by the twelfth legislative assembly, and was approved by the governor on January 28, 1911, and, it will be observed, in

section 1 assumes to prohibit the transportation of women and girls into this state from another state for immoral purposes, and to punish as a felony those who shall aid any such girl or woman in obtaining such transportation. Prior to the passage of this law the Congress of the United States had, on June 25, 1910, passed what is known as the Mann Act (Fed. Stat. Ann. 1912 Supplement, 419), in the second section of which it is provided that any person who shall aid or assist in procuring any ticket or any form of transportation to be used by any girl or woman in interstate commerce in going to any place for the purpose of prostitution or debauchery or for any immoral purpose shall be deemed guilty of a felony.

“The contention of counsel for the defendant is that the transportation of persons from one state to another, whatever the purpose, is interstate commerce; that the provisions of section 8, clauses 3 and 18, of the federal Constitution, which confer upon Congress the power to ‘regulate commerce among the several states,’ and ‘to make all laws which shall be necessary and proper’ for that purpose, are exclusive, at least when Congress has assumed to exercise its delegated powers; that, Congress having manifested its purpose in the Mann Act to take possession of the subject of the transportation of girls and women from one state to another for immoral purposes, and to punish those who might engage in such traffic or seek to aid in the same, the entire matter must be left under federal control, and that the Act under which the information against the defendant was drawn is the result of an unwarranted assumption of power by the legislature; that the legislature having no legal right to legislate upon the matter, its attempted Act could not confer upon the state courts any jurisdiction to punish an offender against the Act. The state law and the federal Act embody substantially the same provisions, and it is clear that it was the intention of Congress to assume control of the subject so far as its power extends.

“The transportation of freight or passengers from one state to another, or through more than one state, is interstate com-

merce; and the regulation thereof by the states is forbidden by the federal Constitution. Such commerce, whether carried on by individuals or corporations, is under the exclusive jurisdiction of Congress. (*State of Indiana v. Pullman Palace Car Co.* (C. C.), 16 Fed. 193, 11 Biss. 561.)

“In *Mondou v. New York etc. R. Co.* [223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (n. s.) 44, 32 Sup. Ct. Rep. 169], the supreme court of the United States, referring to commerce clauses of the Constitution, says: ‘They have been considered by this court so often and under such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being (1) that the term “commerce” comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried by water or by land.’ It is therefore not open to argument but that the transportation of passengers from one state to another is embraced within the meaning of the words ‘interstate commerce,’ and that Congress has the authority to regulate such transportation.

“In the case of *Hoke et al. v. United States* [227 U. S. 308, Ann. Cas. 1913E, 905, 57 L. Ed. 523, 43 L. R. A. (n. s.) 906, 33 Sup. Ct. Rep. 281], it is held: ‘Congress, in the exercise of its power to regulate commerce, could lawfully enact the provisions of the White Slave Act of June 25, 1910 (36 Stats. at Large, 825, Chap. 395, U. S. Comp. Stats. Supp. 1911, p. 1343), making criminal the transportation of women or girls in interstate commerce for the purpose of prostitution or debauchery, or other immoral purposes, or the obtaining, aiding, or inducing of such transportation.’

“That the state law under consideration attempts to control a certain phase of interstate commerce is disclosed in the first three lines of the Act in question, which declare: ‘The importation of women and girls into this state, or the exportation of women and girls from this state for immoral purposes, is hereby

prohibited.' We then have a state law and a federal law, each dealing with the same subject, and are to inquire what effect one has upon the other. Are they of equal potency and effect; are they concurrent, or must one give way to the other?

"Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579, says: 'If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying: "This Constitution and the laws of the United States which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any state to the contrary notwithstanding." ' Further on in the same opinion, the court uses this language: 'This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them.'

"In *Smith v. State of Alabama*, 124 U. S. 465, 31 L. Ed. 508, [8 Sup. Ct. Rep. 564], the supreme court of the United States says: 'The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress,

are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority.'

"In *Covington & Cincinnati Bridge Co. v. Commonwealth of Kentucky* [154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. Rep. 1087], the supreme court of the United States says: 'The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive, and the states cannot interfere at all.'

"It will be admitted without argument that the statute in question does not fall within the third class of cases above mentioned, and that the state under its reserved police power has the right, at least in the absence of congressional legislation, to control the matter of bringing persons into the state, there to engage in immoral practices. In the case of *Hoke et al. v. United States, supra*, the supreme court of the United States says: 'There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach, and over which Congress

power; and, if such power be exerted to control what cannot, it is an argument for, not against, its legality.'

likewise now be conceded that the statute does not fall in the first class of cases above mentioned, for the reason that in *v. United States, supra*, the supreme court has held that the Mann Act is a valid exercise of the power of Congress under the commerce clause of the federal Constitution.

By the process of elimination, removed the Act in from the first and third classifications made by the court in the *Covington & Cincinnati Bridge Co. Case*, it

follows, of necessity, that it must come under the second class—that is, that the power attempted to be exercised is one of those instances in which the state may act in the absence of legislation by Congress—and it remains only to determine what effect the congressional Act has upon the state Act. This subject has been passed upon in a number of recent cases, all holding that in those instances in which the state has power to act in the absence of legislation by Congress, when Congress does, by its Act, manifest a purpose to take possession of a subject within its power under the commerce clauses of the Constitution, all state policies, regulations, and laws upon the subject are superseded by the congressional Act. (*Adams Express Co. v. Croninger* [226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (n. s.) 257, 33 Sup. Ct. Rep. 148]; *Chicago, B. & Q. Ry. Co. v. Miller* [226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. Rep. 155]; *Northern Pac. Ry. v. State of Washington* [222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. Rep. 160]). The same holding has been made by the supreme court of Montana in the recent case of *Melzner v. Northern Pac. Ry. Co.*, 46 Mont. 277, 127 Pac. 1002.

“Counsel for the state, however, insists that both of these Acts remain in effect, and the jurisdiction over the offense named is concurrent in the federal and state courts; that the United States and the state being different sovereignties, the same Act may be an offense against both. This might be true in some instances, but here we are confronted with the fact that, so far as the regulation of interstate commerce is concerned, the states have expressly surrendered the entire subject to the general government, and that, when the general government sees fit to exercise the powers delegated and surrendered to it by the states, the state is precluded from saying that the subject, or any matter connected therewith, is under the concurrent control of the two sovereignties. The case of *State v. Northern Pacific Ry. Co.*, 36 Mont. 582 [13 Ann. Cas. 144, 15 L. R. A. (n. s.) 134, 93 Pac. 945], appears to be an answer to these contentions of counsel. In that case the state sought to punish as a crime the violation of what is known as the Sixteen Hour Law, and, while

if, as is the case, the very provision of the Mann Act above referred to has been authoritatively construed to be a direct regulation of interstate commerce, how can it be said that the like provision of the state statute is not of the same character?

The assertion that the state statute imposes no restriction, condition, or prohibition upon the freedom of individuals in moving from state to state would seem to carry its own answer. When the statute says that importation into, or exportation from, this state of women and girls for immoral purposes is unlawful, it characterizes not merely the act of the person who furthers the importation or exportation, but also the act of the person imported or exported; and the unlawful character of the act of the person imported or exported is not affected by the circumstance that the penalties of the law are not visited upon her. A person is not at liberty to do an unlawful thing. In the absence of both the federal and state statutes, persons would be at liberty to come into and go out of this state, without regard to sex or purpose. Freedom of movement implies the right to receive assistance when such assistance may be had. To deny to A the right to assist B is to deny to B the right to be assisted and so restrict the movements of B. In the case of women and girls who come and go for immoral purposes, this is the laudable purpose of both the state and federal enactments. "If the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to, and the enslavement in prostitution and debauchery of, women, and more insistently of girls." (*Hoke v. United States, supra.*)

While the transportation of persons is a branch of legitimate commerce, to knowingly transport or aid in the transportation of women and girls for immoral purposes is a proceeding which the best sense of all the world will condemn, and which as a menace to its own welfare, any state may prohibit under its police power. Such legislation is doubtless effective so long as

Congress remains silent on the subject. *Morgan etc. S. S. Co. v. State Board of Health*, 115 U. S. 455. 30 L. Ed. 237. 6 Sup. Ct. Rep. 1114; *Cooley v. Post Wardens of Philadelphia*, 12 How. 293, 318, 13 L. Ed. 996; *Corington etc. Bridge Co. v. Kentucky*, *supra.*)

The fallacy of appellant's position here is that, if a state statute is an exercise of the police power, it may be enforced, although it be a direct regulation of interstate commerce in a respect covered by federal legislation. "The line of distinction between that which constitutes an interference with commerce and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that Congress has the power to go beyond the mere regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it should be deemed advisable; and that to whatever extent the ground shall be covered by those directions, the exercise of state power is excluded." (*Cooley's Constitutional Limitations*, 7th ed., 856.)

Of certain quarantine regulations of the state of Louisiana it was remarked by the supreme court of the United States: "While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of federal authority as defined by the Constitution, the latter must prevail." (*Morgan etc. S. S. Co. v. State Board of Health*, *supra.*)

The provision before us declares that, under certain circumstances women and girls are not legitimate subjects of commerce. We will dispute it, but the controlling power to make that on rests with Congress; otherwise the power vested in Congress to regulate interstate commerce, may be circumscribed by the ability of the state to determine what shall or what shall not be regulated. "The police power would not only be a

formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated." (*License Cases (Peirce v. New Hampshire)* 5 How. 597, 600, 12 L. Ed. 256, 298.)

The foregoing is, of course, intended to apply only to those portions of the first section of Chapter 1, Laws of 1911, which relate to transportation into this state from without, and must not be taken as an intimation against the validity of any other provision of that section or of any other section of that Act.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

RINGLING, RESPONDENT, v. SMITH RIVER DEVELOPMENT CO., APPELLANT.

(No. 3,331.)

(Submitted January 8, 1914. Decided January 28, 1914.)

[138 Pac. 1098.]

Real Property—Options—Contracts to Purchase—Pledges—Assignment—Appeal and Error—Presumptions.

Appeal and Error—Presumptions.

1. On appeal the presumption obtains that the trial court did not commit error, and the burden of overcoming that presumption rests upon appellant.

Real Property—Options—Pledges.

2. Where the holder of an option to purchase lands had not paid anything upon it nor taken possession of any of them at the time he assigned it as security for a loan, he had not any interest in the lands which he could have mortgaged, but was the owner of a species of property which he could pledge.

Same—Contract to Purchase—Assignment—Equitable Mortgages.

3. Whether the assignment of a contract to purchase land upon which part payments have been made, and of which land possession has been taken, creates an equitable mortgage upon the realty, depends upon the intention of the parties, determinable from the circumstances attending the transaction.

Same—Contract to Purchase—Pledge.

4. The interest one has in a contract to purchase land, part payment on which he has made and of which he has taken possession, may be pledged as collateral security for the payment of a note.

[As to the law of collateral securities, see notes in 49 Am. Dec. 731; 32 Am. St. Rep. 711. As to distinction between pledge and chattel mortgage, see note in Ann. Cas. 1912B, 962.]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

SUIT by John Ringling against the Smith River Development Company. Judgment for plaintiff, and defendant appeals. **Affirmed.**

Messrs. Walsh, Nolan & Scallon, for Appellant, submitted a brief; *Mr. William Scallon* argued the cause orally.

The agreements between plaintiff and defendant effected and constituted liens and mortgages on real property, to wit, on interests in real estate and the district court in and for Lewis and Clark county had no jurisdiction of the action.

Exhibit "A" (the Catlin contract) is a bilateral contract. It comes, in all respects, within the rules stated in Story on Equity Jurisprudence, ninth edition, section 790, as follows: "If a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made, and it passes by descent to his heir as land. The vendor is deemed in equity to stand seised of it for the benefit of the purchaser; and the trust attaches to the land, so as to bind the heir of the vendor, and every one claiming under him as a purchaser, with notice of the trust." (See, also, 1 Warvelle on Vendors, 185-188; 39 Cyc. 1302; Pomeroy on Equity Jurisprudence, sec. 1261; 28 Am. & Eng. Ency. of Law, 703.) As to Exhibit "B" (the Mayn & Heitman contract): "If it was merely an option at its inception, it soon developed, by virtue of its own provisions, into much more than a mere option. It resulted in placing the legal title in trust for the purchaser, for

as a result of the contract, we find that the title was to be conveyed, and presumably was conveyed, to a trustee for and to the use of the vendee. Evidently, the conveyance was in trust.

We, therefore, submit that under both contracts the title was held in trust for the vendee. It matters not that the trustee was a third party, instead of the vendor himself. Indeed, that very fact adds strength to our contention. In a number of the cases cited in the authorities above referred to, bonds for title are given the same force and effect as a contract for sale and purchase. Surely, such a contract as we are now considering, accomplished by a transfer of title from the vendor to a third party in trust for and to the use of the vendee, with the right of possession in the latter, ought to be as effective.

“A contract giving an option to purchase land will work a conversion of the land, though not exercised until after the death of the vendor.” (7 Am. & Eng. Ency. of Law, 471, 475, 476; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Merritt v. Judd*, 14 Cal. 60, 6 Morr. Min. Rep. 62; *Hill v. Eldred*, 49 Cal. 398; *Sinclair v. Armitage*, 12 N. J. Eq. 174.) In addition to the foregoing we also refer especially to the authorities, cited below, dealing with equitable mortgages.

What, then, was the nature of the mortgage or lien? The answer is readily found in 11 Am. & Eng. Ency. of Law, 130.

“As a general rule, an assignment by the vendee of a contract for the purchase of land, made as a security for a debt, makes the assignee an equitable mortgagee.” (See, also, 1 Jones on Mortgages, 5th ed., sec. 136.)

“An assignment by the vendee of a contract of purchase of land as security for a loan may be regarded as an equitable mortgage. The rules applicable to a mortgage of real property govern it both as to the effect of it and the mode of enforcing it.” (*Id.*, sec. 172; *Brockway v. Wells*, 1 Paige Ch. (N. Y.) 617, s. c., with note, in 2 Lawyers' Reprint N. Y. Chancery Reports, 773; 27 Cyc. 981.)

The liens and mortgages, being on an interest in real estate, could only be foreclosed in the county of Meagher, in which the

real estate was and is situated. (Const., Art. VIII, sec. 11; Rev. Codes, sec. 6501; *Urton v. Woolsey*, 87 Cal. 38, 25 Pac. 154; *Fritts v. Camp*, 94 Cal. 393, 29 Pac. 867; *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000; *Pacific Yacht Club v. Sausalito B. W. Co.*, 98 Cal. 487, 33 Pac. 322; *Duffy v. Duffy*, 104 Cal. 602, 38 Pac. 443.)

The statutory right to redeem is a substantial right which cannot be denied to the judgment debtor. (*Parker v. Dacres*, 130 U. S. 43, 32 L. Ed. 848, 9 Sup. Ct. Rep. 433; *Brine v. Hartford Fire Ins. Co.*, 96 U. S. 627, 24 L. Ed. 858.)

Messrs. H. G. & S. H. McIntire, for Respondent, submitted a brief; *Mr. H. G. McIntire* argued the cause orally.

"The instruments in writing which evidence the transactions between the parties will not be held to constitute a mortgage unless the evidence shows that they were so intended by the parties, and the burden of proof in that regard is upon the plaintiff," i. e., the party asserting a mortgage was intended. (*Morris v. Nyswanger*, 5 S. D. 307, 58 N. W. 800, citing *Wallace v. Johnstone*, 129 U. S. 58, 32 L. Ed. 619, 9 Sup. Ct. Rep. 243; *Hanford v. Blessing*, 80 Ill. 188; *Stahl v. Dehn*, 72 Mich. 645, 40 N. W. 922; *Smith v. Crosby*, 47 Wis. 160, 2 N. W. 104.)

"In distinguishing a pledge from other transactions, courts will endeavor to ascertain from the contract the intention of the parties and to give it effect." (31 Cyc. 788.) "In case of doubt whether a transaction by which personal property is given as security is a pledge, or is a sale, mortgage, or absolute assignment, the law favors the conclusion that it is a pledge." (*Id.*, 797.)

The words "collateral security" are but synonymous with the legal expression "pledge." (Schouler on Bailments, 160; 31 Cyc. 786.) Any valuable thing of a personal nature is the subject of a pledge. The books contain numerous illustrations, e. g., title deeds, leases of real property, deeds, mortgages of real property, judgments, rights or choses in action, etc.

(See 4 Lawson's Rights and Remedies, sec. 1756; Schouler on Bailments, 167; 31 Cyc. 793; Boone on Mortgages, sec. 289.)

The case of *Gardner v. McClure*, 6 Minn. 250, where one indebted on a promissory note had deposited with the payee as security the title deed to real estate, accompanied by a writing which the latter, regarding it as a mortgage on the lands described, brought suit to foreclose, disposes of the contention of respondent that the contracts in this case constituted equitable mortgages. The subject of equitable mortgages arising from the deposit of title deeds is learnedly gone into by the court, which shows that it is an anachronism of the English system, is violative of the statute of frauds, and is generally repudiated in the United States. Another learned decision in opposition to the notion is that of *Bloomfield State Bank v. Miller*, 55 Neb. 243, 70 Am. St. Rep. 381, 44 L. R. A. 387, 75 N. W. 569, where the cases are fully reviewed, and which is directly in point. The matter is, however, of no moment in Montana, nor do the cases referred to in appellant's brief have any bearing, for here the matter is settled by statute. Under section 5749, Rev. Codes, "a mortgage of real property can be created, renewed or extended, only by writing, with the formalities required in the case of a grant of real property." (*Wilson v. Pickering*, 28 Mont. 435, 72 Pac. 821.)

In order to sustain its contention, therefore, that in the transaction with respondent it had given him a mortgage on interests in real property, it was incumbent on the appellant both to plead and show by evidence an instrument in writing, duly executed by it, sufficient in form and substance to comply with the said statute. This it has failed to do.

That Exhibit "A" does not create an equitable title, see 1 Warvelle on Vendors, 2d ed., sec. 176; *Smith v. Jones*, 21 Utah, 270, 60 Pac. 1104, 1106.

Exhibit "B" is but an option or privilege to purchase. It contains no covenant or obligation on the part of the party of the second part thereto to do anything thereunder, and in that regard is unilateral. As to such agreements, and indeed, even

as to such set forth in Exhibit "A," the case of *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695, is conclusive. Under an option, the optionee acquires no land nor interest in land, but he does obtain what is often of much value, the privilege at his election to demand and receive the conveyance of land. (*Myers v. Stone*, 128 Iowa, 10, 111 Am. St. Rep. 180, 102 N. W. 507; *Sweezy v. Jones*, 65 Iowa, 272, 21 N. W. 603; *Gustin v. Union School Dist.*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; *Jackson v. Sessions*, 109 Mich. 216, 67 N. W. 315; *Clarno v. Grayson*, 30 Or. 111, 46 Pac. 426; *Sheehy v. Scott*, 128 Iowa, 551, 4 L. R. A. (n. s.) 365, 104 N. W. 1139; *Smith v. Jones*, 21 Utah, 270, 60 Pac. 1104; *Clark v. American D. & M. Co.*, 28 Mont. 468, 72 Pac. 978; *Snider v. Yarbrough*, 43 Mont. 203, 115 Pac. 411.) Under these decisions, and particularly under Revised Codes, sections 4430, 4590, 4912, 4556, the agreement evidenced by Exhibit "B" can be regarded only as a personal right or privilege, i. e., as personal property, is transferable either by pledge, or otherwise, and its situs is at the residence of the owner.

This brings us to the contention of appellant, that the lower court had no jurisdiction of the present action; in other words, that respondent's action is local, and can only be maintained in Meagher county. We understand the rule to be that: "Where the relief sought does not require the court to deal directly with the estate itself, the proceeding does not affect real estate" (*Hayes v. O'Brien*, 149 Ill. 403, 23 L. R. A. 555, 37 N. E. 73; *Munger v. Crowe*, 219 Ill. 12, 76 N. E. 50; *Anaheim Odd Fellows' Hall Assn. v. Mitchell*, 6 Cal. App. 431, 92 Pac. 331), and "the principal question involved in a case is the one which determines whether the action is local or transitory." (8 Current Law, 2236.) One of the leading California decisions, wherein the statutes of that state on the subject are considered and construed, is *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356. There and in many cases since the rule was stated and followed, that only in those cases which are strictly and exclusively local, and which have no feature of transitory actions, does California section

392 (Rev. Codes, sec. 6501) apply. Wherever personal relief against the defendant is also sought sec. 395 (Rev. Codes, sec. 6504) is the controlling statute. See *Warner v. Warner*, 100 Cal. 11, 34 Pac. 523, *Smith v. Smith*, 4 Cal. Unrep. 860, 38 Pac. 43, *Booker v. Aitken*, 140 Cal. 471, 74 Pac. 11, *Anaheim Odd Fellows' Hall Assn. v. Mitchell*, 6 Cal. App. 431, 92 Pac. 331, *Samuel v. Allen*, 98 Cal. 406, 33 Pac. 273, *Miller & Lux v. Kern County Land Co.*, 140 Cal. 132, 73 Pac. 836, wherein the cases cited by appellant are distinguished (*White v. Adler*, 5 Cal. Unrep. 215, 42 Pac. 1070); and see *Le Breton v. Superior Court*, 66 Cal. 27, 4 Pac. 777; *Hayes v. O'Brien*, 149 Ill. 403, 23 L. R. A. 555, 37 N. E. 73; *Munger v. Crowe*, 219 Ill. 12, 76 N. E. 50; *State ex rel. Schatz v. District Court*, 40 Mont. 173, 105 Pac. 554.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On October, 28, 1910, the Smith River Development Company, a Montana corporation, with its principal place of business at Helena, executed and delivered to John Ringling its promissory note for \$16,000, due six months after date with interest at eight per cent per annum. About the same time it procured a contract for the purchase of certain lands in Meagher county known as the Catlin lands, payment for which was to be made in installments covering a period extending to February, 1914. The defendant, having paid two installments due upon the contract, went into possession of the land, and thereafter, on December 28, 1910, by an instrument in writing it transferred, set over, and delivered to Ringling the Catlin contract, with all its right, title, and interest therein, as collateral security for the payment of the note above. About the same time it also secured an option in writing to purchase the Mayn & Heitman ranches in Meagher county, upon installments extending to May, 1915, and on February 9, 1911, it assigned, set over, transferred, and delivered this instrument, with all its right, title and interest therein, to Ringling as further collateral security for the pay-

ment of the same note; \$5,519.55 was paid upon the indebtedness in June, 1911, and no further payments having been made, this suit was instituted in 1912 in Lewis & Clark county to secure a judgment for the balance due and a decree foreclosing the defendant's interest in the securities mentioned. A demurrer for want of jurisdiction was interposed and overruled, and the defense of want of jurisdiction was made in the answer. The plaintiff prevailed upon the trial and secured a decree fixing the amount due, and directing the sheriff to sell the securities mentioned, upon five days' notice, and to execute to the purchaser a certificate of sale without the right of redemption. This appeal is from the judgment, and the record presents only the pleadings, the decree and the notice of appeal.

We have purposely omitted reference to many matters contained in the pleadings, which, while proper for consideration in the district court, do not reflect in any manner upon the question before us.

If the assignment of the contract in the one instance, and the option in the other, conveyed to Ringling an interest in land as security for the debt due, the transactions amounted to a real estate mortgage which could only be foreclosed in a suit instituted in Meagher county, and in that event the defendant would be entitled to the statutory period of redemption. If we were called upon to determine the character of the security given to Ringling, our inquiry would be limited to construing the agreement made on December 28, 1910, when the contract was assigned, and also, the agreement of February 9, 1911, by which the option was transferred as further security; but that is not the question before us. The trial court held that those agreements resulted in Ringling receiving into his possession the contract and option as personal property, delivered in pledge as security for the payment of the \$16,000. We enter upon our [1] investigation indulging the presumption that the trial court did not err, and the appellant must assume the burden of overcoming that presumption. (*Toole v. Weirick*, 39 Mont. 359, 133 Am. St. Rep. 576, 102 Pac. 590.) In the absence of

any evidence disclosing the circumstances under which the securities were given, or reflecting the intention of either the debtor or the creditor, and, indeed, in the absence of the writing assigning either the contract or the option, appellant must assume the burden of showing that the trial court's conclusion is erroneous under any possible state of facts consistent with the declaration of the record that by an instrument in writing, duly executed by it, the defendant assigned, transferred, and delivered the contract in the one instance, and the option in the other, as collateral security for the payment of a debt. So far as this record discloses, the defendant company had not paid anything upon the Heitman option, and had not taken possession of any [2] of the lands described in that instrument at the time the option was assigned, and therefore it did not have any interest in the lands themselves (*Smith v. Jones*, 21 Utah, 270, 60 Pac. 1104), and could not have given a real estate mortgage upon them or upon any interest in them (*Provident Life & Trust Co. v. Mills* (C. C.), 91 Fed. 435). It did, however, have the right to purchase, and that right may have been valuable. (*Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695.) It was such a species of property as might be sold, transferred, or assigned (*Winslow v. Dundom*, 46 Mont. 71, 125 Pac. 136), and, being personal property, it could be pledged. When the record discloses that the option (the writing) was actually delivered to Ringling as security for his note, it would seem that a pledge was created, within the meaning of sections 5774 and 5775, Revised Codes. In any event, the appellant has failed to overcome the presumption in favor of the correctness of the trial court's ruling, so far as the option is concerned.

Although the subject is a debatable one, we may assume, without deciding, that by reason of making certain payments upon the Catlin contract and taking possession, the defendant had acquired an equitable interest in the land prior to the time the contract was assigned to Ringling. If so, it is very clear that such an interest could be mortgaged. We may further assume [3] that the assignment of such a contract, as security for the

payment of a debt, would, generally speaking, create an equitable mortgage upon real estate. Still that result does not necessarily follow. "But here, as in other cases, the question whether the transaction creates an equitable mortgage depends upon the intention of the parties in that behalf, and this is to be determined by a consideration of the circumstances attending it." (27 Cyc. 981.) While our attention has not been directed to any case directly in point, our conclusion is fortified by the [4] logic of analogous cases. The authorities seem quite uniform in holding that a lease of, or mortgage upon, real estate may be pledged (*Dewey v. Bowman*, 8 Cal. 145; *Jones on Pledges and Collateral Securities*, sec. 143; *Denis on Contracts of Pledge*, 56; *Colebrooke on Collateral Securities*, 3), and we see no difference in principle between the pledge of a lease and the pledge of a contract to purchase land. If the parties so intended, they might have created a real estate mortgage by complying with the provisions of section 5749, Revised Codes, but whether the assignment in this instance contained the formalities required in the case of a grant to real property we have no means of knowing. The assignment is not set forth in the pleadings, but so far as we are able to determine its character from the description given, it did not pretend to transfer any interest in the land itself (*Gardner v. McClure*, 6 Minn. 250 [Gil. 167]), but referred only to the contract and to the defendant's interest in it. If this be true, then we are of the opinion that the defendant's interest in it was such that the contract might have been pledged.

Since it is possible that these transactions might have constituted a pledge of each of these instruments, the appellant has failed to overcome the presumption attaching to the judgment of the district court, and for this reason that judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. HACKSHAW, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 3,431.)

STATE EX REL. IHMSEN ET AL., RELATORS, v. TATTAN,
JUDGE, RESPONDENT.

(No. 3,430.)

(Submitted January 12, 1914. Decided January 28, 1914.)

[138 Pac. 1100.]

Intoxicating Liquors—Licenses—Board of County Commissioners—Appeal to District Court—Procedure—Jurisdiction—Prohibition—Writ Does not Lie, When.

Intoxicating Liquors—Licenses—Appeal to District Court—Procedure—Jurisdiction.

1. Under section 3, of Chapter 35, Laws of 1913, the applicant for license to sell liquor in any place not within the corporate limits of a city or town, as well as the protestants against the issuance thereof, may appeal from the action of the board of county commissioners to the district court, the appeal to be taken in the manner provided for appeals from justice of the peace courts, the position of the board being that of the justice as relates to the practice to be pursued. To make an appeal from a justice's court effective, a notice of appeal as well as an undertaking must be filed with the justice. *Held*, that where protestants against the issuance of a license omitted to file either a notice of appeal or an undertaking with the board, the district court did not acquire jurisdiction of the appeal, in the absence of conduct amounting to a waiver by the adverse party—the applicant for license.

Prohibition—Does not Lie, When.

2. The members of a board of county commissioners having had no personal interest in whether the district court should entertain an appeal from the board's decision on an application for a liquor license in a village, their application to restrain such court from so doing cannot be entertained.

Original applications for writs of prohibition to the district court of the twelfth judicial district and John W. Tattan, a judge thereof, by John Hackshaw, and by G. C. Ihmsen and others, as members of the board of county commissioners of Chouteau county. Motion to quash sustained as to the board, and overruled as to relator Hackshaw and alternative writ made peremptory.

Mr. H. S. McGinley and Mr. H. F. Miller, for Relators, submitted a brief, and argued the cause orally.

Mr. Vernon E. Lewis, for Respondents, submitted a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Original applications for writs of prohibition. Prior to June 20, 1913, the relator Hackshaw applied by petition to the board of commissioners of Chouteau county, for a license to engage in business as a retail liquor dealer at the village of Flowerree, in Chouteau county. The application was made under the provisions of section 3 of the Act of the thirteenth legislative assembly, approved February 27, 1913 (Laws Thirteenth Session, Chap. 35). Within the time allowed for that purpose, certain freeholders, residents of Flowerree and the vicinity, filed their protest against the issuance of the license. On June 30th, after a hearing fixed by previous notice for that day, [1] the protest was overruled and the license granted. The protestants, being dissatisfied with the action of the board, caused to be served upon the attorney for the relator and the chairman of the board their notice of appeal and an undertaking on appeal, and filed them with the clerk of the district court. At the same time they caused to be filed with the clerk of the board, and served upon its chairman, the following request:

“To the County Clerk of the County of Chouteau, State of Montana:

“Notice of appeal in the above-entitled action having been this day filed with the clerk of the district court of the Twelfth judicial district in and for the county of Chouteau, you are hereby requested to certify to the said clerk of the district court any and all proceedings of the board of county commissioners of Chouteau county, in the above-entitled action.

“Dated this 23d day of July, A. D. 1913.

“**VERNON E. LEWIS,**
“Attorney for Appellants.”

Thereafter, on December 3d, Hackshaw moved the court to dismiss the appeal on the ground, among others, that it had not been perfected in conformity with the requirements of the statute, and that for this reason the court was without jurisdiction to entertain and determine it. On December 27th the motion was denied. Thereupon Hackshaw applied to this court for a writ to prohibit that court and its judge from proceeding to hear the appeal. At the same time G. C. Ihmsen, F. H. McGowan, and Jurgen Engellant, as members of the board, also applied for a writ. Inasmuch as both applications sought to accomplish the same end, the court directed them to be consolidated, and ordered the alternative writ to issue accordingly. The defendants filed a motion to quash the writ, and also an answer, which, however, presents no question of fact. The question to be determined, therefore, is: Did the court, by the proceeding detailed above, acquire jurisdiction of the appeal?

In the section of the statute referred to *supra* is found this provision: "From the decision of the board of county commissioners the applicant for license, or the protestants against the issuance thereof, may appeal to the district court of said county within thirty days after the decision of the board of county commissioners. The appeal shall be taken and heard in the same manner as appeals from justice courts to the district court, except that the appeal shall be heard, if possible, within thirty days from the time of filing in the district court, and the same shall be determined without delay." The Constitution provides that appeals shall be allowed from justice courts to the district courts "in such manner and under such regulations as may be prescribed by law." (Const., Art. VIII, sec. 23.) The rules prescribed by the legislature under which such appeals may be taken, so far as it is necessary to notice them here, are found in section 7121 of the Revised Codes, as amended by the Act of 1911 (Session Laws 1911, p. 8), and sections 7123 and 7124. Amended section 7121 provides that: "The appeal is taken by serving a copy of the notice of appeal on the adverse party or his attorney and by filing the original notice of appeal with the

justice or judge." The order in which these acts are done is not important. Under section 7123 the justice, within ten days after receiving the notice and the undertaking required by the next section, must transmit to the clerk of the district court a copy of his docket and all the papers filed in the case, together with the notice and the undertaking. Section 7124 declares the appeal not effectual for any purpose unless an undertaking is filed as therein prescribed. While under section 7128 the appeal may be preserved by substituting a good undertaking for one that is merely defective or irregular (*Marlowe v. Michigan Stove Co.*, ante, p. 342, 137 Pac. 539), and under certain circumstances the requirements prescribed touching the service of notice, etc., may be waived (*Davidson v. O'Donnell*, 41 Mont. 308, 110 Pac. 645; *Jenkins v. Carroll*, 42 Mont. 302, 112 Pac. 1064), nevertheless, in the absence of such conduct of the adverse party as amounts to a waiver, there must be a substantial compliance with all these provisions in order to give the district court jurisdiction to proceed with the trial upon the merits. (*State ex rel. Rosenstein v. District Court*, 41 Mont. 100, 21 Ann. Cas. 1307, 108 Pac. 580.)

In providing the method of appeal from the decision of the board, the legislature evidently did so with the intention that for the purpose to be served by it, the petitioner and the protestants are to be deemed to be the real adversary parties, and the board to bear the same relation to the decision made by it as does a justice of the peace to a judgment rendered by him. That this is so is made manifest by the fact that in providing for appeals from orders allowing or disallowing claims against counties, the legislature has regarded the claimant or the objecting taxpayer, as the case may be, and the county as the real parties in interest, and prescribed a method of appeal apparently suited to that situation. (Rev. Codes, sec. 2947.) Its intention is also shown by the additional consideration that the real parties in interest are in fact the petitioner for the license, and the residents of the community in which the business of retailing liquor is to be conducted, the theory of the statute

being that the residents of the vicinity in which the business is to be carried on shall have notice of the purpose to establish in their midst a business which, though lawful, is often objectionable. In other words, the statute accords to communities outside of incorporated cities and towns the right to appear before the board as adversary parties and oppose the issuance of the license. From this point of view, therefore, the board is the judicatory tribunal vested with the power to determine the rights of the parties just as does a justice of the peace in an ordinary action between adversary parties. It is *pro hac vice* the "justice or judge" with whom the original notice and the undertaking must be filed under amended section 7121 and section 7123, *supra*, and by whose agency, acting through the clerk, the files and transcript of the proceedings are transmitted to the clerk of the district court. After the board has performed these functions, neither it nor any member of it has any interest in the proceedings, other than such as a justice of the peace has in an ordinary action removed by appeal from his court. Since the protestants in seeking to remove the proceeding to the district court failed to pursue the provisions of the statute, the court did not acquire jurisdiction to entertain the appeal or determine the controversy on its merits.

Counsel for defendants insists, however, that the course pursued by him in taking the appeal is authorized by the decision in *State ex rel. Riddell v. District Court*, 27 Mont. 103, 69 Pac. 710. Upon examination of the provisions of the statute (Rev. Codes, sec. 1588), prescribing the method of taking appeals from the determinations of the board of medical examiners in certain instances, which were examined somewhat in that case, it will be found that they are wholly different in their requirements. Besides, the only question there determined was whether the notice was sufficient in form and substance to convey to the board the information necessary to bring it before the court as the adversary party, which, under the provisions of the statute, it becomes when an appeal is taken from its action.

Counsel also insists that the request filed with the clerk of the board and served upon its chairman was a sufficient notice of appeal. In view of what has been said, for the purpose of the appeal the adverse party was the petitioner. While the recitals in the notice served upon him were sufficient to meet the requirements of the statute, neither the notice nor the undertaking was ever filed with the "justice or judge" within the meaning of the statute; therefore the filing of this request with the board served no office whatever. It was merely notice to the clerk to file with the clerk of the district court a transcript of the proceedings had before the board.

Since the members of the board have no personal interest in [2] the question whether the district court shall entertain the appeal or not, this court may not entertain an application by them to restrain its action in assuming to entertain the appeal. The motion to quash, so far as they appear as relators, is sustained and the proceeding is as to them dismissed. The relator Hackshaw is entitled to the relief demanded. Accordingly, as to him, the motion to quash is overruled, and the alternative writ made peremptory.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

SMITH, APPELLANT, v. KIRK, RESPONDENT.

(No. 3,345.)

(Submitted January 10, 1914. Decided January 28, 1914.)

[138 Pac. 1086.]

Default Judgment—Vacation—Appeal from Order—Record—Insufficiency.

1. On appeal from an order setting aside a default judgment, the papers actually used as the basis of the order must be embodied in a bill of exceptions certified by the trial judge, copies certified by the clerk or attorneys being insufficient.

Appeal from District Court, Hill County; Frank N. Utter,

ACTION by W. T. Smith against James Kirk. From an order setting aside defendant's default, plaintiff appeals. Affirmed.

Mr. R. E. O'Keefe, and *Messrs. Nelson & Moore*, for Appellant, submitted a brief; *Mr. O'Keefe* argued the cause orally.

Mr. W. B. Sands submitted a brief in behalf of Respondent, and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for loss sustained by the plaintiff by reason of the sale to him by defendant of a glandered horse. The defendant suffered default, and judgment was thereupon entered for the relief demanded. On motion of defendant, an order was made setting aside the default and judgment, and he was permitted to file an answer. Plaintiff has appealed.

The appeal cannot be considered on the merits, for the reason that, whereas the motion was based upon a showing of excusable neglect, the record does not embody properly authenticated copies of the affidavits filed in support of it. It has often been [1] announced by this court that, upon an appeal from an order such as the one at bar, the papers actually used as the basis of it in the district court must be embodied in a bill of exceptions certified by the judge *a quo*, and that copies certified by the clerk or attorneys only will not be considered, that further announcement on the subject ought not to be necessary. On the authority of *Latimer v. Nelson*, 47 Mont. 545, 133 Pac. 680, the latest announcement on the subject, and the cases cited therein, the order appealed from is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

SNYDER, RESPONDENT, v. TOWN OF CHINOOK, APPELLANT.

(No. 3,334.)

(Submitted January 9, 1914. Decided January 29, 1914.)

[138 Pac. 1090.]

Personal Injuries—Cities and Towns—Defective Streets—Duty of Defendant—Instructions—Harmless Error—New Trial—Misconduct of Juror—Insufficient Showing.

Personal Injuries—Cities and Towns—Defective Streets—Duty of Defendant.

1. When the public streets of a city or town are rendered unsafe by reason of repairs being made therein, or have become defective from any cause, and the authorities have or should have notice of the condition, the duty to warn the public by lights or barriers arises, the traveler not being bound to make investigation or chargeable with negligence if he fails to do so.

[As to liability of municipality for defects in or want of repair of streets, see note in 103 Am. St. Rep. 257.]

Same—Evidence—Improper Cross-examination.

2. Where a witness on his direct examination had testified as to the physical condition of a street in which he had left it the day preceding the night on which plaintiff was injured, with relation to the placing of lights or barriers, a question on cross-examination touching his previous experience in road work was improper.

Same—Instructions—Harmless Error.

3. Microscopic error in the giving of instructions touching the amount which the jury might award for loss of earning capacity in a personal injury action will not work a reversal of the judgment.

New Trial—Misconduct of Juror—Intoxication.

4. Misconduct on the part of a juror because of intoxication while deliberating on the verdict may not be proved by the affidavit of another juror.

Appeal from District Court, Blaine County; Frank N. Utter, Judge.

ACTION by Susie Snyder against the town of Chinook. Judgment for plaintiff, from which, and from an order denying a new trial, defendant appeals. Affirmed.

Mr. R. E. O'Keefe, for Appellant, submitted a brief and argued the cause orally.

Messrs. Nelson & Moore, and *Messrs. Stranahan & Stranahan*, for Respondent, submitted a brief; *Mr. W. R. Nelson* argued the cause orally.

A person has a right to assume that the street was in a reasonably safe condition, or, if not, that the town would warn of the danger. (*McCabe v. City of Butte*, 46 Mont. 65, 125 Pac. 133.) This same authority holds that a traveler is not negligent if he does not examine the way, and that even if he knew the street was defective it was not *per se* contributory negligence to use it, if ordinary care was exercised in doing so. On the other hand, it was negligence upon the part of the town to fail to put up barriers or signal lights, and such failure on the part of the defendant is the proximate cause of the injury. (*Carty v. Boeseke-Dawe Co.*, 2 Cal. App. 646, 84 Pac. 267; 28 Cyc. 1381, 1432.) A city is liable even if plaintiff knew the way was dangerous, where it has failed to maintain lights or guards. (*Stock v. City of Tacoma*, 53 Wash. 226, 101 Pac. 830.) A pedestrian has a right to assume that the city's sidewalks will be maintained in reasonably safe condition. (*Ashley v. City of Aberdeen*, 46 Wash. 385, 90 Pac. 210.) The use of a particular street, when there is another safer one that might have been used, is not sufficient in itself to constitute contributory negligence. (*Cady v. City of Seattle*, 42 Wash. 402, 85 Pac. 19.) This case also holds that where a street was in use for a long time with the knowledge of the city officers, the fact that it had never been graded or formally opened for travel does not relieve the city from liability for injuries caused by its defective condition. (*City of Stillwater v. Swisher*, 16 Okl. 585, 85 Pac. 1110.)

Plaintiff had no knowledge of the defective condition of Ohio street before the injury occurred. She could not, therefore, be held guilty of contributory negligence in using the defective path or sidewalk, there being no barriers or lights to warn or give signal of danger, and she had a right to presume that the way was safe. (*O'Flynn v. City of Butte*, 36 Mont. 493, 93 Pac. 643; *May v. City of Anaconda*, 26 Mont. 140, 66 Pac. 759.) Where improvements are made in a street, it is the duty of the city to guard them so as to protect travelers in the street who are in the exercise of due care, from receiving injury there-

from. (28 Cyc. 1402.) The duty of the municipality is generally measured by the requirements of ordinary prudence in keeping its streets in a condition of reasonable safety for travel, and while lighting, railing or guarding, according to the peculiar circumstances, may answer the demands of the law, the one or the other of these precautions may be necessary to relieve the city from liability where the defect or obstruction is such that under the particular conditions the danger may be reasonably apprehended, and the adoption of such precaution is necessary in the exercise of reasonable care to afford protection against the danger. The precaution should be sufficient to give such warning as will reasonably notify all persons using the streets that the danger is there. (28 Cyc. 1403-1405.)

MR. JUSTICE SANNER delivered the opinion of the court.

The amended complaint alleges that on the night of September 20, 1910, while the respondent was walking along a sidewalk or footpath upon Ohio street, in the incorporated town of Chinook, she fell into an unguarded excavation negligently maintained by said town adjacent to said footpath, sustaining personal injury to her damage in the sum of \$3,400. The answer admits the injury to respondent, the public character of Ohio street—though not the public character of the place where the injury occurred—denies all the other essential allegations of the amended complaint, and, by way of affirmative defenses, alleges contributory negligence and assumption of risk. These affirmative defenses were put in issue by reply. The cause was tried to a jury, by whose verdict the respondent was awarded \$1,000. Judgment was entered accordingly. Appellant's motion for new trial was denied, and the cause is now before us upon appeal from the order denying such motion, as well as from the judgment.

As grounds for reversal the appellant urges: Insufficiency of the evidence; error in rulings upon evidence; error in instructions; and misconduct of the jury.

1. For some time prior to the accident such work had been going on in Ohio street under the direction of the town of Chinook that embankments were formed on each side of the street, so that the portions of the street intended for sidewalk purposes were left three or four feet higher than the roadway. Along this embankment on the east side and quite close to the edge in places, there was a path which persons were accustomed to travel going north from Second street. On the night of the accident there were no barriers or guards of any kind to prevent the traveler along this path from falling over the embankment, nor any lights to warn against it. Under these circumstances, the respondent, who had never traveled that way before, was homeward bound between 8:30 and 9 o'clock in the evening. She had come eastward on Second street, crossed on the boardwalk from the west to the east side of Ohio street, turned north on the east side of Ohio street, and followed the footpath northward for about thirty-five feet. At this point she stepped into a break or hole in the side of the path, which she could not or did not see, and was precipitated into the roadway. As the result her leg was broken, her ankle was twisted, her earning capacity was much reduced, and she sustained several months of pain and suffering.

From the appellant's point of view, the case made by the respondent in the district court presented three points of attack, *viz.*: Whether she was on Ohio street or on private property when the injury occurred; whether Ohio street was in a reasonably safe condition for travel at the time and place of the accident; and whether the respondent was exercising reasonable care for her own safety. The court very commendably submitted special interrogatories to the jury covering these points and the jury answered categorically that the respondent was on Ohio street when the accident happened; that Ohio street was not at the time and place of the accident in a safe condition for travel; and that the respondent was exercising due care. The evidence germane to these propositions was more or less conflicting, but it was ample to sustain these findings as well as

the general verdict of the jury; and no good purpose would be served by reciting it further.

The theory of the appellant seems to have been that, if it was too dark for the respondent to see clearly, she had no business to travel on Ohio street and assumed all the risk of doing so. But this overlooks the rules very accurately applied by the court and jury to the facts: That it is the duty of a city or town to keep its public streets in an ordinarily safe condition for travel; and that the traveler is entitled to assume this to have been done. When the public streets of a city or town "are [1] rendered unsafe by reason of repairs being made therein, or have become defective or unsafe from any cause, and the authorities have notice of the condition, or the circumstances are such as to warrant a presumption of notice, the duty to warn the public by lights or other means, while repairs are made, also arises. The traveler is not bound to make investigations, and he cannot be charged with negligence if he fails to do so." (*McCabe v. City of Butte*, 46 Mont. 65, 125 Pac. 133; *Nilson v. City of Kalispell*, 47 Mont. 416, 132 Pac. 1133; *Cady v. City of Seattle*, 42 Wash. 402, 85 Pac. 19; see, also, 28 Cyc. 1381 *et seq.*)

2. Three rulings upon evidence are complained of, but we can find no error in any of them. The direct examination of the [2] witness McCoy was addressed to the physical condition in which he had left the street the day before the accident, as to whether any barriers or lights had been installed. To this the proposed cross-examination touching his previous experience in road work was not material. The statement of the respondent which it is claimed should have been stricken out as volunteered was part of her response to a specific interrogatory of counsel. The question asked Lowe was not open to the objection made, and the ruling upon it would not have constituted substantial error even if it had been wrong.

3. Instructions numbered 1 and 8 are assailed as authorizing the jury to award the sum of \$1,000 for loss of earning capacity, whereas under the allegations of the amended complaint such [3] damages could not in any event exceed \$946. Instruction

No. 1 defined the issues substantially as they were presented by the pleadings. Whatever mathematical discrepancy there was in the complaint between the claim for special damages and the items recited in support of it was faithfully made to appear in the charge, and the amounts which might be awarded for any of the elements of damage were limited by instruction No. 8 to actual compensation under the proof; so that, not only were both instructions entirely proper, but instruction No. 8 was protective of appellant. We again repeat that it is hopeless at this day and age for counsel to expect reversals for microscopic faults.

4. The particular misconduct charged to the jury is that one of the jurors was intoxicated at the time the jury was deliberat-[4] ing on the verdict. This is made to appear by the affidavit of another juror. The rule is that such misconduct cannot be proved in this way. (*Sutton v. Lowry*, 39 Mont. 462, 471, 104 Pac. 545.)

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

KIRK, RESPONDENT, v. SMITH, APPELLANT.

(No. 3,337.)

(Submitted January 10, 1914. Decided January 31, 1914.)

[138 Pac. 1088.]

Finding Lost Property—Livestock—Estrays—Complaint—Damages—Compensation—Instructions.

Actions—Special Statutes—Complaint.

1. One who seeks recovery for a liability or obligation imposed by special statute must in his complaint state facts which bring his case squarely within its terms.

Finding Lost Property—Complaint—Insufficiency.

2. Assuming that sections 5178–5186, Revised Codes, dealing with the subject "Finding," are applicable to the case of one who picks

the other party's interest in the land. The court held that the plaintiff was entitled to a decree of specific performance of the contract.

Case—*Long v. Long*, 13 Cal. 2d 100 (1943).

In the case of *Long v. Long*, the plaintiff, a woman, brought an action for specific performance of a contract to sell her land to the defendant, a man. The contract was made in 1935, and the plaintiff had been in possession of the land ever since. The defendant had not paid for the land, and the plaintiff had not received any of the purchase money. The court held that the plaintiff was entitled to a decree of specific performance of the contract.

Case—*Long v. Long*, 13 Cal. 2d 100 (1943).

The court held that the plaintiff was entitled to a decree of specific performance of the contract. The court found that the contract was valid and enforceable, and that the plaintiff had been in possession of the land for a long time. The court also found that the defendant had not paid for the land, and that the plaintiff had not received any of the purchase money. Therefore, the court granted the plaintiff's request for specific performance of the contract.

The court also held that the plaintiff was entitled to a decree of specific performance of the contract. The court found that the contract was valid and enforceable, and that the plaintiff had been in possession of the land for a long time. The court also found that the defendant had not paid for the land, and that the plaintiff had not received any of the purchase money. Therefore, the court granted the plaintiff's request for specific performance of the contract.

Instruction 1. (To be read to the jury if requested.)

The plaintiff claims that she is entitled to a decree of specific performance of the contract. She claims that the contract is valid and enforceable, and that she has been in possession of the land for a long time. She also claims that the defendant has not paid for the land, and that she has not received any of the purchase money. Therefore, she requests a decree of specific performance of the contract.

Long v. Long, 13 Cal. 2d 100 (1943). *Long v. Long*, 13 Cal. 2d 100 (1943).

NOTE BY JAMES E. HARRIS, V. T. SMITH, JUDICIAL OFFICER FOR PLANNING AND CONSTRUCTION DEPARTMENT, BOSTON AND MEMBERS.

NOTE BY JAMES E. HARRIS, V. T. SMITH, JUDICIAL OFFICER FOR PLANNING AND CONSTRUCTION DEPARTMENT, BOSTON AND MEMBERS.

The plaintiff claims that she is entitled to a decree of specific performance of the contract. She claims that the contract is valid and enforceable, and that she has been in possession of the land for a long time. She also claims that the defendant has not paid for the land, and that she has not received any of the purchase money. Therefore, she requests a decree of specific performance of the contract.

It is the duty of the court to grant a decree of specific performance of the contract.

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lost property. (19 Cyc. 541; *Dougherty v. Posegate*, 3 Iowa, 88; 19 Cyc. 541; *Wentworth v. Day*, 3 Met. (Mass.) 352, 37 Am. Dec. 145; *Amory v. Flyn*, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316; *Watts v. Word*, 1 Or. 86, 62 Am. Dec. 299.) The complaint does not state a cause of action because it claims a reward for finding the sheep without alleging that any reward was offered, and does not claim a reward for keeping the sheep, as provided by law.

There is no allegation in the complaint that the 500 sheep belonging to the appellant were lost, and without this allegation no evidence was admissible to show that the sheep were lost, and the question of the sheep being lost should not have been submitted to the jury. The complaint does not state a cause of action because it does not allege that the 500 head of sheep were lost. A thing is lost when it cannot be found, or when ordinary vigilance will not regain it. (25 Cyc. 1605; *State Savings Bank v. Buhl*, 129 Mich. 193, 56 L. R. A. 944, 88 N. W. 471.)

Mr. W. B. Sands, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiff states his cause of action as follows: "(1) That on or about the 12th day of November, 1911, this plaintiff found, wandering upon the prairie in the county of Chouteau, a band of about five hundred (500) sheep belonging to this defendant, which said sheep this plaintiff immediately took into his possession and promptly gave notice to this defendant, the owner thereof, and that he cared for and fed the said sheep until the 29th day of January, 1912. (2) That \$187 is a reasonable compensation for the care of said sheep; that \$100 is a reasonable reward for the finding and keeping of said sheep." An allegation of nonpayment is followed by the prayer. The trial resulted in a verdict in favor of plaintiff, and, from the

judgment entered thereon and from an order leaving him a new trial defendant requested.

1. Court and witness apparently proceeded upon the assumption that sections 3173 and 3174, Revised Codes dealing with the [2] subject "Fencing," as applied to lost property, are intended to cover the case of one who finds other domestic animals. Therefore this assumption is justified in not before us upon the theory advanced the complaint fails to state a cause of action. Plaintiff does not come upon a contract express or implied nor seeks recovery for a liability or obligation imposed by special statute. In such a case the rule is settled in this state that in order to avail oneself of the statute relied upon, the complaint must state the facts which bring him squarely within its terms. (*Kelly v. Northern Pac. Ry. Co.*, 35 Mont. 242, 55 Pac. 100; *Thurman v. Pittsburg etc. Copper Co.*, 41 Mont. 141, 108 Pac. 555; *Macy v. Northern Pac. Ry. Co.*, 41 Mont. 51, 108 Pac. 5; *Kinsel v. North Butte M. Co.*, 44 Mont. 445, 120 Pac. 731.) Whatever else may be said of the [2] statute under consideration, this much is certain: The subject matter is lost property. The several provisions can be invoked only in the event that the property in controversy was in fact lost. To bring himself within the statute, it was necessary for plaintiff to allege that the sheep—the subject matter of this action—were lost, and, in failing to do so, he fails to state a cause of action upon the theory adopted by him. Counsel for respondent is in error in urging that this necessary allegation omitted from the complaint was supplied by the answer.

2. Upon the trial, plaintiff was asked: "Q. Mr. Kirk, what would you consider the reasonable reward for the finding of the band of sheep that you found, on or about the 12th day of November, 1911, at your ranch, numbering about 500 head?" and, over objection he answered: "\$100." On cross-examination, he testified: "I base my claim for \$100 for letting them [3] stay there; for coming home and seeing them there." An instruction was given that, in addition to the compensation awarded plaintiff, the jury might add such sum, not exceeding

\$100, as, in their judgment, constituted a reasonable reward for keeping the sheep. It is quite evident that plaintiff's theory was that a reward is a mere gratuity, a gift, and that this theory found favor with the trial court. It is not contended that this \$100 claimed as a reward represents the value of time spent, or labor expended upon the sheep, or the value of the use of plaintiff's premises, or of feed consumed, or that it is demanded by way of recompense for the responsibility imposed by the care of these animals. All these elements were considered elsewhere. By what process plaintiff arrived at the exact amount (\$100) is not disclosed.

It is elementary that the law does not give something for nothing. Except in those rare cases of aggravated circumstances where punitive damages are recoverable, the law proceeds uniformly upon the theory of compensation. If a party can be made whole, if he can be restored to the *status quo*, if damages in money will reimburse him for whatever he has done for, or suffered at the hands of, another, he cannot complain, and he has neither legal nor moral excuse for demanding more. To speak of an enforced gratuity is a contradiction of terms, and a suit to compel a gift is an anomaly in the law.

Counsel refer to section 5181, Revised Codes, as authority for the position taken by the plaintiff and adopted by the court. That section reads: "The finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation, and for any other service necessarily performed by him about it, and to a reasonable reward for keeping it." Standing alone, it does not admit of the construction placed upon it; but we are not permitted to consider it alone. Section 5178 provides: "One who finds a thing lost is not bound to take charge of it, but if he does so, he is thenceforth a depositary for the owner, with the rights and obligations of a depositary for hire." When these two sections are construed together, the terms of section 5181 are made plain. The depositary for hire is only entitled to ordinary compensation, except in so far

as this rule is modified by section 5159; and, since the plaintiff is in no better position than he would have been had he taken these sheep from the owner under an agreement to care for them for reasonable remuneration, his recovery must be based upon the theory of compensation alone. The term "reward," as used in section 5151, means remuneration or pay. (Webster's International Dictionary; 34 Cyc. 1730.) The same word is used in this same sense in section 5154, and the conclusion is fortified by a consideration of section 5146, which enumerates some of the duties of the depository of live animals. In submitting to the jury the right of plaintiff to recover a gratuity, the trial court erred; and, since it is impossible to determine to what extent the verdict was influenced by this consideration, a new trial must be had.

3. Complaint is made of certain rulings upon the introduction of evidence, but these alleged errors will doubtless not occur upon a retrial.

While plaintiff cannot go beyond the issues made by the pleadings and prove the value of services rendered about the [4] care of an entire band of sheep, including the sheep mentioned in his complaint, still the fact that he was caring for other sheep at the same time presents no obstacle to his recovering whatever is justly due him for his services, expenses, etc., laid out about the particular sheep in controversy here, provided his evidence is sufficient to disclose to the jury the value of the proportion of his time, labor, feed, etc., given to the particular sheep mentioned in his complaint.

Since this cause must be remanded for a new trial, we refrain from commenting upon the sufficiency of the evidence.

4. Complaint is made of instruction No. 3½, given to the [5] jury. We think it correct so far as it goes. If defendant desired a more specific instruction upon the subject of lost , it was his duty to offer one. (*Frederick v. Hale*, 42 3, 112 Pac. 70.) His offered instruction No. 2 was not nplete than the one given by the court.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

AMERICAN LIVESTOCK & LOAN CO., RESPONDENT, v.
GREAT NORTHERN RY. CO., APPELLANT.

(No. 3,332.)

(Submitted January 13, 1914. Decided February 11, 1914.)

[138 Pac. 1102.]

Pleading and Proof—Variance—When Fatal—Parties—Joint and Several Causes of Action—Technicalities.

Variance—When Immaterial—When Fatal.

1. Mere divergencies in detail in the proof from the allegation of a pleading are immaterial (Rev. Codes, sec. 6585); where, however, one contract is pleaded and another one is proved, or where the complaint alleges one breach of duty and the evidence establishes a different one, the variance amounts to a failure of proof (sec. 6587), justifying a nonsuit.

[As to reversal of judgment for technical violation of rule that allegations and proof must agree, see note in Ann. Cas. 1913D, 68. As to right of appellate court to reverse judgment *sua sponte*, for variance, see note in Ann. Cas. 1914A, 468.]

Same—Joint and Several Causes of Action.

2. Under the rule that neither in actions *ex contractu* nor in actions *ex delicto* can the plea of an obligation to the plaintiff individually be sustained by proof of an obligation running to himself and others jointly, *held*, in an action by a cattle owner against a railroad company based upon a complaint counting on the failure of the carrier to supply cars on a given day for the shipment of plaintiff's cattle, that there was a fatal variance between his pleading and the evidence, which showed that the obligation to furnish cars ran to a combination of cattle owners, of which plaintiff was one, and not to him individually.

Causes of Action—Joint and Several.

3. An obligation running to a combination of persons jointly could not be changed into one actionable by any member of it, by the fact that defendant's agent knew from previous transactions that plaintiff was a member of the combination, and that failure to perform would result in damage to the latter.

Variance—Technicalities.

4. While matters of mere technicality are not looked upon with favor by the supreme court, the contention that because the rule requiring

affairs and proof to correspond is, in a measure, technical and it should be disregarded, has no merit, since its abrogation does not make for simplicity and justice, but result in confusion, and often in a denial of justice.

from District Court, Valley County; Frank N. Utter,

by the American Livestock & Loan Company against Northern Railway Company. From a judgment for defendant appeals. Reversed and remanded, with dismissal complaint.

Fearey & Veasey, for Appellant, submitted a brief; for Fearey, Jr., argued the cause orally.

General rule of pleading, whether an action is based upon a written contract, or upon a contract implied in law or by act of the parties or otherwise, that the contract or obligation must be correctly stated and that there must be no variance. The complaint, in stating the terms of the contract or obligation, must show the right of the plaintiff upon it. So, also, the proof must sustain these allegations. Thus in 31 Cyc. 707, is found the following statement of the general principle: "The proof must show the facts to the contract, decree, deed, transaction, or promise alleged in the pleadings." Again on page 705 of the same work: "Every averment which the pleadings make is a descriptive part of a cause of action must be sustained and any variance which destroys the legal effect of the matter or thing averred with the matter or thing is fatal."

Cyc. 756, we find the following: "A joint contract is given in evidence where a several contract is given. Therefore, it is immaterial whether the action is brought upon a contract express or implied, or as upon a duty or obligation imposed by law upon a

common carrier. In any event, it is incumbent upon the plaintiff to state facts showing what the duty or obligation, contractual or otherwise, was, and that plaintiff had a right to assert a breach of that obligation or duty. The proof, in this case, however, shows no violation of duty to plaintiff, but, if to anyone, a violation of a duty to the Helena Pool, which alone had the right to control the disposition of the cars ordered by it. The proof did not show the same duty, obligation, "contract, transaction or proceeding as is alleged in the pleadings." Or to express the matter in the language of another portion of the text above, "the legal identity of the matter or thing averred with the matter or thing proved was destroyed." The issue has really been decided by this court of this state in the case of *Wahle v. Great Northern Ry. Co.*, 41 Mont. 326, at 332, 109 Pac. 713.

Messrs. Stiles & Devaney, and *Mr. Thomas Dignan*, for Respondent, submitted a brief; *Mr. Chester L. Nichols*, of Counsel, argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Among the issues tendered by the complaint and joined by the answer are these: "That on or about the 17th day of September, 1910, plaintiff, being the owner and in possession of 140 head of fat beef cattle, then located and grazing in the vicinity of Malta, Montana, notified and informed the defendant of that fact, and that it desired and intended to ship said cattle to the Union Stock Yards, Chicago, Illinois, over the line of the defendant and succeeding connecting common carriers for sale upon the market at that point, and * * * requested and directed the said defendant as such common carrier to provide and furnish for the loading, shipment and transportation of said cattle from its said station of Malta, Montana, on September 30th, 1910, a sufficient number of suitable stock-cars for the loading and transportation of said cattle to said destination," and all of which the defendant, on or about said September 17, 1910, promised and agreed to do. "That

Counsel also insists that the request filed with the clerk of the board and served upon its chairman was a sufficient notice of appeal. In view of what has been said, for the purpose of the appeal the adverse party was the petitioner. While the recitals in the notice served upon him were sufficient to meet the requirements of the statute, neither the notice nor the undertaking was ever filed with the "justice or judge" within the meaning of the statute; therefore the filing of this request with the board served no office whatever. It was merely notice to the clerk to file with the clerk of the district court a transcript of the proceedings had before the board.

Since the members of the board have no personal interest in [2] the question whether the district court shall entertain the appeal or not, this court may not entertain an application by them to restrain its action in assuming to entertain the appeal. The motion to quash, so far as they appear as relators, is sustained and the proceeding is as to them dismissed. The relator Hackshaw is entitled to the relief demanded. Accordingly, as to him, the motion to quash is overruled, and the alternative writ made peremptory.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

SMITH, APPELLANT, v. KIRK, RESPONDENT.

(No. 3,345.)

(Submitted January 10, 1914. Decided January 28, 1914.)

[138 Pac. 1086.]

Default Judgment—Vacation—Appeal from Order—Record—Insufficiency.

1. On appeal from an order setting aside a default judgment, the papers actually used as the basis of the order must be embodied in a bill of exceptions certified by the trial judge, copies certified by the clerk or attorneys being insufficient.

Appeal from District Court, Hill County; Frank N. Utter, Judge.

ACTION by W. T. Smith against James Kirk. From an order setting aside defendant's default, plaintiff appeals. Affirmed.

Mr. R. E. O'Keefe, and *Messrs. Nelson & Moore*, for Appellant, submitted a brief; *Mr. O'Keefe* argued the cause orally.

Mr. W. B. Sands submitted a brief in behalf of Respondent, and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for loss sustained by the plaintiff by reason of the sale to him by defendant of a glandered horse. The defendant suffered default, and judgment was thereupon entered for the relief demanded. On motion of defendant, an order was made setting aside the default and judgment, and he was permitted to file an answer. Plaintiff has appealed.

The appeal cannot be considered on the merits, for the reason that, whereas the motion was based upon a showing of excusable neglect, the record does not embody properly authenticated copies of the affidavits filed in support of it. It has often been [1] announced by this court that, upon an appeal from an order such as the one at bar, the papers actually used as the basis of it in the district court must be embodied in a bill of exceptions certified by the judge *a quo*, and that copies certified by the clerk or attorneys only will not be considered, that further announcement on the subject ought not to be necessary. On the authority of *Latimer v. Nelson*, 47 Mont. 545, 133 Pac. 680, the latest announcement on the subject, and the cases cited therein, the order appealed from is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

Counsel also insists that the request filed with the clerk of the board and served upon its chairman was a sufficient notice of appeal. In view of what has been said, for the purpose of the appeal the adverse party was the petitioner. While the recitals in the notice served upon him were sufficient to meet the requirements of the statute, neither the notice nor the undertaking was ever filed with the "justice or judge" within the meaning of the statute; therefore the filing of this request with the board served no office whatever. It was merely notice to the clerk to file with the clerk of the district court a transcript of the proceedings had before the board.

Since the members of the board have no personal interest in [2] the question whether the district court shall entertain the appeal or not, this court may not entertain an application by them to restrain its action in assuming to entertain the appeal. The motion to quash, so far as they appear as relators, is sustained and the proceeding is as to them dismissed. The relator Hackshaw is entitled to the relief demanded. Accordingly, as to him, the motion to quash is overruled, and the alternative writ made peremptory.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

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ACTION by W. T. Smith against James Kirk. From an order setting aside defendant's default, plaintiff appeals. Affirmed.

Mr. R. E. O'Keefe, and *Messrs. Nelson & Moore*, for Appellant, submitted a brief; *Mr. O'Keefe* argued the cause orally.

Mr. W. B. Sands submitted a brief in behalf of Respondent, and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

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The appeal cannot be considered on the merits, for the reason that, whereas the motion was based upon a showing of excusable neglect, the record does not embody properly authenticated copies of the affidavits filed in support of it. It has often been [1] announced by this court that, upon an appeal from an order such as the one at bar, the papers actually used as the basis of it in the district court must be embodied in a bill of exceptions certified by the judge *a quo*, and that copies certified by the clerk or attorneys only will not be considered, that further announcement on the subject ought not to be necessary. On the authority of *Latimer v. Nelson*, 47 Mont. 545, 133 Pac. 680, the latest announcement on the subject, and the cases cited therein, the order appealed from is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

this court in the cases where the variance has been held material and fatal, and in the cases where it has not. In accordance with this construction, we have said that, where one contract is pleaded and another one is proved, or where the complaint alleges one breach of duty, and the evidence establishes a different one, the variance amounts to a failure of proof, upon the occurrence of which a nonsuit is proper. (*McCrimmon v. Murray*, 43 Mont. 457, 117 Pac. 73; *Knuckey v. Butte Electric Ry. Co.*, 41 Mont. 314, 109 Pac. 979; *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416; *Forsell v. Pittsburgh etc. Copper Co.*, 38 Mont. 403, 100 Pac. 218; *Spellman v. Rhode*, 33 Mont. 21, 81 Pac. 395; *Kalispell Liquor Co. v. McGovern*, 33 Mont. 394, 84 Pac. 709; *Childs v. Ptomey*, 17 Mont. 502, 43 Pac. 714; *Gilliam v. Black*, 16 Mont. 217, 40 Pac. 303.) These decisions have their counterpart in others which enforce the rule that mere divergencies in detail are not of vital consequence. (*Mosher v. Sutton's New Theater Co.*, ante, p. 137, 137 Pac. 534; *Previsich v. Butte Electric Ry. Co.*, 47 Mont. 170, 131 Pac. 25; *Robinson v. Helena L. & Ry. Co.*, 38 Mont. 222, 239, 99 Pac. 837.)

The question, then, is whether the evidence presented by the respondent sustained the cause of action pleaded in the complaint. [2] The case was tried in the district court upon the theory that the order for cars placed on September 17th did not give rise to a contractual relation, and that the appellant's liability, if any, arises from its duty as a common carrier to furnish cars upon reasonable notice. While there is abundant authority for the conclusion that, under the evidence presented by the respondent, a contractual relation was created (*Clark v. Ulster & Del. R. R. Co.*, 189 N. Y. 93, 121 Am. St. Rep. 848, 12 Ann. Cas. 883, and note at page 885, 13 L. R. A. (n. s.) 164, 81 N. E. 766), the question is unimportant, because error is not predicated upon the theory adopted, and because the essentials and consequences of a variance are not affected thereby.

In this case the order for cars was placed in the name of the Helena Pool, by the manager of the Helena Pool, for a definite

number of cars estimated by him as sufficient to meet the needs of the Helena Pool. At no stage of the transaction did the respondent present or seek to assert its individuality; it tendered no cattle, it demanded no cars, it made no complaint. At no time could the appellant have made any effective offer of cars to the respondent or demand that the respondent ship its cattle without regard to the other members of the pool. The purpose for which the cars were to be furnished is described by all the witnesses as "a shipment" of cattle by the Helena Pool. That the obligation imposed upon appellant by the order of September 17th was to the Helena Pool, and not to the respondent cannot, we think, be doubted. Now, neither in actions *ex contractu* nor in actions *ex delicto* can the plea of an obligation to the plaintiff individually be sustained by the proof of an obligation running to himself and others jointly, for the reason that, to maintain a joint obligation, all the obligees must be parties to the action. This was the rule at common law (*Farni v. Tesson*, 1 Black (U. S.), 309, 17 L. Ed. 67; Pomeroy's Code Remedies, secs. 184-189); it is still the rule under the Codes (Rev. Codes, sec. 6491; *Montana Mining Co. v. St. Louis, M. & M. Co.*, 19 Mont. 313, 48 Pac. 305; Pomeroy's Code Remedies, sec. 197; Sutherland on Code Pleading, secs. 18, 19; Bliss on Code Pleading, secs. 63-65), and its justification may be found in the almost universal conviction that the multiplication of suits over a single cause of action is contrary to sound public policy.

The rule just stated has reference, of course, only to those obligations in which the legal interest is joint, and by "legal [3] interest" is meant, not the interest which may be had in the sum of money or other benefit to accrue upon the performance of the obligation, but "the legal, technical interest" created by the obligation itself; hence the converse of the foregoing is that, though an obligation be joint by its terms, each obligee may nevertheless maintain an action upon it, if, in fact, the legal interest is several, as where specific sums or benefits are made to inure to the obligees in severalty. The argument

of respondent rather vaguely suggests that the obligation at bar is of the character last described; but the very most to be said from respondent's point of view is that from previous transactions the appellant's agent knew respondent as a member of the pool, knew that the shipment, when made, would include an unknown number of respondent's cattle, which would be billed in its name, and knew, or should have known, that failure to furnish the cars ordered might result in some damage to the respondent. That these circumstances unaided could not change an obligation which by its terms ran to the respondent and others jointly into one actionable by the respondent alone is clear from the authorities cited above, as well as from the following additional ones: *Florence v. Helms*, 136 Cal. 613, 69 Pac. 429; *Graves v. Boston etc. Ins. Co.*, 2 Cranch (U. S.), 419, 2 L. Ed. 324; *Ford v. Bronaugh*, 11 B. Mon. (Ky.) 14; *Stearns v. Martin*, 4 Cal. 227; *Titus v. Railroad Co.*, 5 Phila. (Pa.) 360; *Simpkins v. Montgomery*, 1 Nott & McC. (S. C.) 589; *Gray v. Johnson*, 14 N. H. 414; *Snell v. De Land*, 43 Ill. 323; *Rorabacher v. Lee*, 16 Mich. 168; *Bradley's Executor v. Maull*, 4 Har. (Del.) 223; *Richey v. Branson*, 33 Mo. App. 418; *Davis v. Wannamaker*, 2 Colo. 637; *Curry v. Kansas etc. Ry. Co.*, 58 Kan. 6, 48 Pac. 579; *Holyoke v. Loud*, 69 Me. 59; *McIntosh v. Zaring* (Ind. Sup.), 38 N. E. 321; *Wright v. Gilbert*, 51 Md. 146; *McCord v. Seale*, 56 Cal. 262.

The complaint is made in respondent's brief that the proposition involved in this appeal is technical. While we have repeatedly said that matters of mere technicality will receive scant consideration in this court, it surely is not a valid objection to a matter of substance that it is also technical and formal. The complaint in a civil action is a matter of form, but it is so far from being a mere matter of form that no defense can be aptly presented, no testimony be intelligently taken, and no judgment be responsively entered so as to protect the public from endless litigation, without a complaint stating with substantial accuracy the matters upon which relief is claimed; and to abrogate the rule requiring the pleadings and proof to cor-

respond would not make for simplicity and justice, but for confusion, for delay, and for the denial of justice in many cases.

In view of the foregoing, the questions suggested by the other assignments of error become wholly academic, and need not be considered.

The judgment appealed from must be reversed and the cause remanded, with directions to dismiss the complaint. It is so ordered.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STATE, RESPONDENT, v. JONES, APPELLANT.

(No. 3,297.)

(Submitted February 5, 1914. Decided February 24, 1914.)

[139 Pac. 441.]

*Criminal Law—Homicide—Self-defense—Character Evidence—
Photographs—Instructions—Trial—Irresponsive Answers—
Evidence—Objections—Practice.*

Criminal Law—Trial—Evidence—Irresponsive Answer—When Harmless Error.

1. Though refusal to strike out an irresponsible answer in which the witness volunteers a statement of facts from which the complaining party has probably suffered prejudice will result in a reversal of the judgment, such refusal held harmless error where the objectionable statement was volunteered on cross-examination after having been twice before made on his direct examination.

Same—Character Evidence—Rebuttal—What Inadmissible.

2. Where a defendant on trial for crime calls witnesses to testify to his good character in the community in which he resides, cross-examination as to their knowledge of disparaging rumors affecting his reputation is proper, but evidence showing particular acts of lawlessness committed by the defendant is inadmissible for the purpose of rebutting testimony tending to show his good character.

[As to weight of evidence of good character of defendant in criminal case, see note in Ann. Cas. 1913E, 16.]

Same—Attorneys—Misconduct—Questions Assuming Facts.

3. The putting of questions to witnesses in a criminal prosecution which assume the existence of facts derogatory to the character of

defendant, and inadmissible if offered as independent evidence, constitutes gross misconduct on the part of the prosecuting attorney.

Same—Trial—Evidence—Objections—Practice.

4. Where objection to evidence of a certain character has once been made, it is not incumbent upon counsel, nor proper, to constantly repeat the same objection to like evidence by other witnesses.

Same—Homicide—Self-defense—Evidence—Reputation of Deceased.

5. In a trial for homicide, where the issue is self-defense, evidence of the reputation of the deceased as a man of a turbulent and violent character (even though unknown to the defendant at the time of the killing) is admissible to aid the jury in solving the question as to who was the probable aggressor.

[As to admissibility of evidence of character or reputation of deceased in homicide case, see note in 134 Am. St. Rep. 726.]

Same—Evidence—Photographs—Admissibility.

6. After a photograph has, by the evidence of the person who made it or of any competent witness, been shown to be a fair and correct representation of one whose identity is in question, it is admissible as a means of identifying him.

Same.

7. *Held*, under the rule declared in paragraph 6, *supra*, that error was committed in excluding a photograph claimed by defendant to represent deceased, together with depositions of the warden of a state prison and others to the effect that the person thus pictured was that of one J., a man of a violent disposition, as well as in rejecting an offer of testimony, by witnesses who knew deceased, to identify the photograph as his, even though it incidentally appeared therefrom that deceased was an ex-convict.

[As to admissibility of photographs as evidence, see notes in 75 Am. St. Rep. 468; 114 Am. St. Rep. 437.]

Same—Instructions—Reasonable Doubt—"Should"—"Must."

8. Instructions to the jury to the effect that before they could convict defendant of the crime of murder in the first degree they "should" be satisfied of his guilt beyond a reasonable doubt, *etc.*, and that they "should" (instead of "must") acquit him unless they were so satisfied, *held*, not reversible error.

[As to instructions concerning reasonable doubt, see note in 48 Am. St. Rep. 566.]

Same—Instructions—Manslaughter.

9. Where under the evidence the defendant was either guilty of murder or guilty because the homicide was done in self-defense, it was error to instruct that "no provocation by words only, however insulting or threatening, will * * * reduce the killing to manslaughter," since there was not any evidence to which the instruction applied.

Sum of Proof—Improper Instructions.

giving of an instruction, the effect of which was to permit the jury to weigh the evidence in a prosecution for homicide, under instructions applicable to civil cases as to the quantum of evidence necessary to prove a fact, was error.

from District Court, Lewis & Clark County; J. M. Judge.

WILLIAM JONES, convicted of murder in the first degree, appeals from the judgment and an order denying his motion for a new trial. Reversed and remanded.

Messrs. C. A. Spaulding, and Homer G. Murphy, for Appellant, submitted a brief; *Mr. Spaulding* argued the cause orally.

Refusal to permit counsel for the defendant to cross-examine the witness Davis, by requiring such witness to indicate upon counsel the manner in which the first shots exchanged between defendant and deceased were fired, was error. Undoubtedly a clearer idea is conveyed of how swiftly another moved under certain circumstances if the witness illustrates the movement than if he should testify merely that the person "moved swiftly." Such illustrations by a witness have received and should receive the approval of courts of justice. They stand, as was said by the court of criminal appeal of Texas, on the same footing as maps and diagrams. (*Black v. State*, 46 Tex. Cr. 590, 81 S. W. 302; *State v. McGann*, 8 Idaho, 40, 66 Pac. 823; *People v. Maughs*, 149 Cal. 253, 86 Pac. 187.)

The question asked on the cross-examination of the witness Baker assumes and states as a fact that appellant at some time went up to the Castle to beat up a woman. Of course, it was never in evidence that he did at any time go up to the Castle to beat up a woman; nor could it be put in evidence by the state, for to do so would violate the elementary rule that specific acts of violence on the part of a defendant charged with a crime are not competent as evidence of his general reputation for being a quarrelsome or peaceable person. (*McCarty v. People*, 51 Ill. 231, 99 Am. Dec. 542; *Gifford v. People*, 87 Ill. 210; *Hirschman v. People*, 101 Ill. 568; *Moulton v. State*, 88 Ala. 116, 6 L. R. A. 301, 6 South. 758; Wharton's Criminal Evidence, sec. 61.) Under the authorities it cannot be doubted that it was improper to permit a question to be propounded in the very objectionable form indicated. The rule is firmly established that it is improper to ask on cross-examination any question embracing a statement of fact not in evidence. (3 Wigmore on

Evidence, 2344; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *Carpenter v. Ambrosion*, 20 Ill. 170; *Yount v. Strickland*, 17 Wyo. 526, 101 Pac. 942; *State v. Parker*, 172 Mo. 191, 72 S. W. 650; Jones on Evidence, sec. 843; *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655, 31 L. R. A. 294, 41 Pac. 998; *People v. Un Dong*, 106 Cal. 83, 39 Pac. 12; *State v. Crowe*, 39 Mont. 174, 18 Ann. Cas. 643, 102 Pac. 579; *People v. Derbert*, 138 Cal. 467, 71 Pac. 564; *Spencer v. Commonwealth*, 32 Ky. Law Rep. 880, 107 S. W. 342; *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719; Wharton's Criminal Evidence, sec. 61.)

The repeated rulings of the trial court regarding the admission of the photograph of deceased in evidence, and its identification as a photograph of the deceased, constitute reversible error. It is elementary that one charged with homicide who claims to have acted in self-defense is entitled, as a matter of right, to prove, if he can do so, that his adversary was a person whose general reputation for peace and quiet was bad. (McClain on Criminal Law, sec. 307; *State v. Shafer*, 22 Mont. 17, 55 Pac. 526.) This appellant sought to do by showing that the ex-convict mentioned in the deposition of Snook was the person with whose killing appellant stood charged. That a photograph of a person is admissible in evidence without preliminary proof from the photographer, see *State v. Roberts*, 28 Nev. 350, 82 Pac. 100. Photographs are always competent and admissible when identified by any witness as correct representations of persons or places. (McClain on Criminal Law, sec. 406; Underhill on Criminal Evidence, 62, 63; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *Ruloff v. People*, 45 N. Y. 213; *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *People v. Grill*, 151 Cal. 592, 91 Pac. 515; *State v. McCoy*, 15 Utah, 136, 49 Pac. 420.)

The following instruction was given: "You are instructed that no provocation by words only, however opprobrious or threatening, will mitigate an intentional killing, so as to reduce the killing to manslaughter." By it the jury were in effect told that even if, as a fact, there was at the time of the homicide a

“sudden quarrel or heat of passion,” still, if that quarrel or heat of passion was engendered in a particular manner, appellant was, notwithstanding, guilty of murder. This was error. (*Lynn v. People*, 170 Ill. 527, 48 N. E. 964; *State v. Buffington*, 71 Kan. 804, 4 L. R. A. (n. s.) 154, and note, 81 Pac. 465; *State v. Grugin*, 147 Mo. 39, 71 Am. St. Rep. 553, 42 L. R. A. 774, 47 S. W. 1058; *Commonwealth v. Hourigan*, 11 Ky. Law Rep. 509, 12 S. W. 550; *State v. Hudspeth*, 150 Mo. 12, 51 S. W. 483; *Massie v. Commonwealth*, 16 Ky. Law Rep. 790, 29 S. W. 871; *Stott v. Commonwealth*, 17 Ky. Law Rep. 308, 29 S. W. 141; *State v. Matthews*, 148 Mo. 185, 71 Am. St. Rep. 594, 49 S. W. 1085; *Findley v. State*, 125 Ga. 579, 54 S. E. 106.)

Mr. D. M. Kelly, Attorney General, and *Mr. J. H. Alvord*, Assistant Attorney General, submitted a brief in behalf of Respondent.

Where a plea of self-defense is made, the general reputation of the deceased for violence and turbulence may be shown as a part of the defense for two distinct purposes: (1) To show the reasonableness and degree of defendant's apprehension of injury from the deceased's threatening acts or demonstrations during the difficulty; and (2) as bearing upon deceased's state of mind and the question of whether or not he was the aggressor. (6 Encyclopedia of Evidence, 771; Wharton on Homicide, 3d ed., 429.) But for either of these purposes such evidence is not admissible unless the reputation of deceased for quarrelsomeness and turbulence is first shown to have been known to the accused. (Wharton on Homicide, 3d ed., sec. 263.) No such testimony was introduced. Hence any offering of proof as to deceased's reputation was premature and immaterial, and there was no error in excluding the photograph attached to the deposition offered but excluded. Besides, it is to be noticed in this regard that several matters important to be shown were entirely left out of the deposition. They were, (1) that deponent saw the photograph taken; (2) that deponent knew when it was taken; (3)

that deponent knew by what means it was made; and (4) that deponent knew by whom it was made.

Grievous reproaches or opprobrious words will not be regarded as a provocation sufficient to arouse in a reasonable man a sudden heat of passion required to reduce an otherwise murderous homicide to manslaughter; such is, we think the real meaning of the rule. It has been thus applied in California, which state defines manslaughter exactly as it is defined by our Code: "Words, however grievous, do not reduce a homicide from murder to manslaughter." (*People v. Lynch*, 101 Cal. 229, 35 Pac. 860.) "Sudden heat of passion must have been caused by a serious and highly provoking injury, apparently sufficient to have aroused an irresistible impulse to kill. Such an impulse would exclude the idea of premeditation." (*People v. Mendenhall*, 135 Cal. 344, 67 Pac. 325; *People v. Freeland*, 6 Cal. 96; *People v. Hurtado*, 63 Cal. 288.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of murder in the first degree and sentenced to imprisonment for life. He has appealed from the judgment and the order denying his motion for a new trial. The integrity of the judgment is assailed on the ground that prejudicial error was committed by the court in its rulings upon questions of evidence and in submitting instructions to the jury. Contention is also made that the court permitted such misconduct by the county attorney that the defendant was prevented from having a fair trial. The defendant admitted the homicide and undertook to justify it on the ground of self-defense.

The encounter resulting in the homicide occurred in the early (Sunday) morning of March 31, 1912, in a saloon known as the Manhattan Club, at the head of Joliet street in the city of Helena. The place was kept by the deceased, Robert Johnson, and one Ward Cole, both negroes, and was a popular resort among a certain class of colored people. On the evening of the 30th a visit was made to it by several persons with the purpose

of promoting the interests of candidates for election to office at the approaching city election. The deceased, who had charge at the time, asked the defendant to go out and invite in colored men from other places. This he did. There was then some discussion by speakers as to the merits of the parties represented by them and their candidates, during which beer and other refreshments were served at the expense of the visitors. The defendant asked to be served with beer. He was told by deceased that he could get a glass of beer by paying for it. The defendant remonstrated, calling the attention of deceased to the fact that the drinks were free and that he (defendant) had accommodated deceased in various ways during the evening, especially by going to invite in a crowd at the request of the latter, but remonstrance was fruitless. The result was an altercation during which vile epithets were exchanged and a fight was narrowly averted. Finally the deceased ordered the defendant from the place. He did not go at once but waited until the meeting adjourned. He then went, after using threats against the deceased. This was about 11 o'clock. Having walked about the streets for some minutes and visited other places in the neighborhood, he went to the saloon of a friend and borrowed a revolver with which the killing was done, explaining to his friend that he going out early in the morning with another friend to shoot rabbits. This intention he mentioned to others also. The revolver was not then loaded, but the defendant, having some cartridges of suitable caliber, went to his room and obtained them and after loading the revolver, put it into his pocket. One witness testified, substantially, that he met the defendant on the street in the vicinity of the Manhattan Club; that the defendant referred with feeling to the treatment he had received at the hands of the deceased; that when the witness parted with the defendant, the latter invited him to go to the Manhattan Club, saying that he was going to have it out with the deceased, and that "they would either carry him out dead or Johnson out dead." The witness refused to go. Some minutes later the defendant entered the resort. There was then

present, besides the deceased, one John Davis, who was the only eye-witness, other than defendant, as to what was the order of events immediately preceding the homicide. We shall not state the testimony in detail. Davis stated that when the defendant entered he referred to the episode of the evening before and remonstrated with the deceased; that the deceased refused to discuss the matter, telling the defendant that the incident was closed and that he should go out; that he himself interposed by suggesting that life is too short to permit worries over such small affairs; that he invited the defendant and deceased to have a drink at his expense and advised them to forget their differences; that the deceased then gave the defendant a twenty-five cent piece; that the defendant bought a drink; that when this occurred the witness thought the deceased and defendant had become friendly again; but that immediately thereafter while he was apparently waiting for deceased to serve him a cigar, the defendant shot the deceased. He stated that when the defendant began to shoot he hurried from the place, but as he passed out he saw the deceased fall. The story of the defendant is in substantial agreement with that of Davis, except as to who ordered the drinks and except, also, as to who was the aggressor. According to his story, he himself ordered the drinks inviting Davis to join him. He stated that Davis declined the invitation saying that he did not drink; that he then ordered a drink of whisky for himself, putting a twenty-five cent piece upon the bar; that after he had taken the drink and as he was returning the glass to the bar, the deceased reached over with his left hand and struck him, knocking off his hat, which fell behind the bar; that he stepped back to avoid further assault and demanded the return of his hat; that the deceased, applying to him a vile epithet and saying, "I will give you your hat," raised a revolver and shot him in the abdomen; that he then drew his revolver and began firing; that the deceased attempted to continue firing but that his revolver seemed to "hang"; that the deceased turned as if to secure another weapon; that the defendant thereupon hurried from the place leaving his hat and calling for the police,

without, however, he stated, having seen the result of the shooting. An autopsy disclosed that deceased had been shot four times, one shot passing entirely through the brain cavity from the left temple and lodging under the scalp on the opposite side of the head. The other wounds were not mortal, but this was and was of such a character as to destroy the power of muscular control and must have caused the deceased to fall as soon as it was inflicted. As defendant left the scene of the shooting and in answer to an inquiry by a witness whom he met on the street as to what was the matter, he stated that he had been shot by Johnson and that he was going to a hospital for medical aid. He did not go to a hospital nor to the police station as he was advised to do by the witness, but went first to the saloon at which he procured the pistol and returned it. He there exhibited to the proprietor a flesh wound in his abdomen, a bullet dropping out as he opened his clothes. He stated that he believed that he had killed "that fellow," without explaining whom he referred to. From there he went to different places, finally going to his rooming-house, where he was later arrested, apparently in hiding in an outhouse.

There was evidence that prior to his return to the Manhattan Club the defendant made other threats against the deceased. One witness stated that while he was at a place kept by one Silverman, where the defendant had his room, the defendant came in and, giving the proprietor his keys, asked him to take care of his dog and other property there. Upon being asked what he was going to do he said that "he was going to kill that black s—— o—— b——." The witness had been present at the Manhattan Club when the altercation occurred there. Other witnesses testified to similar threats made at different places visited by the defendant prior to the homicide. The defendant denied making any threats at all, and accounted for his return to the Manhattan Club by the statement that he knew that the barber-shops did not close on Saturday evenings until about midnight; that the club was supported by the men that worked in the barber-shops; that his purpose on returning to the club was to meet them, and that he had no idea of having trouble with

the deceased. The body of the deceased was found lying between the front and back bars, near the end leading from the front into the space between. In the right hand was a revolver containing two cartridges, one of which had been recently exploded. This brief résumé of the evidence shows that it was in sharp conflict on every material point.

If we accept the story of the encounter as told by the witness Davis, keeping in mind the antecedent threats of the defendant and his procuring the revolver with the apparent purpose of carrying them out, we are compelled to the conclusion that the defendant was properly found guilty as charged. On the other hand, accepting his own story as the correct version of the encounter, the homicide was justifiable because done in necessary self-defense. There is not ground for any other than one of these two conclusions.

Counsel for defendant have assigned and discussed in their brief many alleged errors which are wholly without merit; so much so that we cannot think counsel serious in urging them. For example: The witness Harry Johnson during cross-examination [1] was questioned as to what he heard the defendant say about the deceased at Silverman's saloon a short time before the homicide. He was questioned and answered as follows: "Q. You didn't say a word to him? A. I asked him where he was going. Q. Is that all you said to him? A. He told me that he going to kill that s—— o—— b—— and I laughed at him." Counsel asked to have the answer stricken out as not responsive to the question. The court overruled the motion. A party is entitled to have a responsive answer to a question propounded to a witness by counsel (Jones on Evidence, sec. 815; Underhill on Criminal Evidence, 2d ed., sec. 216), and to have an answer stricken out in which the witness volunteers statements of facts not called for by the question. The refusal of the trial judge to strike out such an irresponsible answer is error, and, if it appears that the evidence embodied in it has probably wrought prejudice to the party complaining, the result will be the reversal of the judgment. The ruling in

question was erroneous but clearly not prejudicial, for the reason that during his examination in chief the witness twice imputed to the defendant the threat embodied in the irresponsible answer, using almost the exact words employed by him in the latter. The statement was relevant, was already in the case, and the repetition of it by the witness could not from any point of view have wrought prejudice. A judgment may not be reversed for such an error. (Rev. Codes, secs. 9415, 9548; *State v. Vanella*, 40 Mont. 326, 20 Ann. Cas. 398, 106 Pac. 364; *State v. Byrd*, 41 Mont. 585, 111 Pac. 407.) We shall, therefore, omit notice of all the assignments which may properly be classed under this head, and give attention to those only which have some basis of merit.

Henry Baker was called to testify as to the reputation of the defendant for peace. He testified that it was good. On cross-[2, 3] examination by the county attorney he was asked: "Did you ever hear about the episode at the Castle when he went up there to beat up a woman?" Objection was made that the question embodied a statement of fact which could not be proved by independent evidence, viz., that the defendant had at some prior time gone up to the Castle (a notorious resort in Helena) to beat a woman, and that the county attorney in putting the question in this form in effect stated to the jury that such an episode had in fact occurred, whereas he would not have been permitted to show it by independent evidence. The county attorney thereafter called other witnesses to whom he put the same question or others similar in form, touching this and other alleged unlawful acts of the defendant. The court overruled the objection. Thereupon the witness answered in the negative. It is argued that the ruling was prejudicial for the reasons stated in the objection, and for the additional reason that in thus putting the question the county attorney was guilty of gross misconduct on account of which alone the defendant ought to be awarded a new trial.

It will be noted that the objection did not technically present the question whether the county attorney was guilty of misconduct. We gather from the colloquy between the presiding judge

and counsel that the judge was of the opinion that it would be competent for the county attorney to introduce independent evidence of special instances of lawlessness by the defendant, to rebut the evidence tending to show his good reputation. The rule is well settled that when a defendant in a criminal case calls witnesses to testify that he possesses such a general reputation in the community in which he resides as tends to rebut the notion that he is guilty of the crime with which he is charged, these witnesses may be questioned on cross-examination as to their knowledge of disparaging rumors or common reports affecting his reputation. As the favorable testimony tends to sustain the presumption of innocence which the law indulges in favor of the defendant, by introducing it the defendant tenders an issue of fact, *viz.*, whether his reputation is such as the witnesses say it is, and the prosecution has the right to cross-examine the witnesses to ascertain the sufficiency of the grounds upon which they base their statements. If, therefore, it can be shown that there are or have been rumors or reports affecting the reputation, to this extent the statements of the witnesses are shown to be without foundation in fact and therefore not entitled to credit. (2 Wigmore on Evidence, sec. 988; Underhill on Criminal Evidence, sec. 82.) The purpose of the inquiry is to ascertain what the witness has heard to the disparagement of the reputation, and not his knowledge of particular acts of misconduct. Extrinsic evidence of particular wrongful acts is therefore not admissible, because it violates the rule against proof of particular facts to establish reputation, declared by the statute. (Rev. Codes, sec. 8024; Wigmore on Evidence, sec. 988; Underhill on Criminal Evidence, sec. 82; 1 McClain on Criminal Law, sec. 307.) The question as put by counsel assumed as a fact that the defendant did go to the Castle for the purpose stated. Though the statement was in the form of an interrogatory, it was as objectionable as if it had been stated in the form of a declaratory sentence and therefore was obnoxious to the rule against proof of particular facts. The situation was not aided by the negative answer of the witness. The answer

did not negative the fact stated, but only that the witness had heard of the fact. If he had answered in the affirmative, the answer would have implied the existence of the fact as well as hearsay knowledge of it by the witness. If it had not been answered at all, it was still objectionable, for it was calculated to leave the jury under the impression that the episode did occur, and hence to furnish them some basis for the damaging inference that the defendant was a lawless character. It is never proper for counsel to so frame questions as to assume the existence of facts which are not admissible if offered as independent evidence. (3 Wigmore on Evidence, 1808; Jones on Evidence, 2d ed., sec. 815; *Gale v. People*, 26 Mich. 157; *People v. Wells*, 100 Cal. 459, 34 Pac. 1078; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *Aiken v. People*, 183 Ill. 215, 55 N. E. 695; *State v. Irwin*, 9 Idaho, 35, 60 L. R. A. 716, 71 Pac. 608; *Howland v. Oakland Con. Ry. Co.*, 115 Cal. 487, 47 Pac. 255; *People v. Ah Len*, 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286; *Krup v. Corley*, 95 Mo. App. 640, 69 S. W. 609.) The attorney who does it is guilty of misconduct which is wholly indefensible, not only because he is proceeding in total disregard of the fundamental rule of evidence, but is at the same time not fair to the defendant. Assuming that in putting the question as he did counsel did so with full knowledge of the limitations of the rule applicable, the observation made by the supreme court of California, in *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229, and approved by this court in *State v. Rogers*, 31 Mont. 1, 77 Pac. 293, is pertinent: "It is quite evident that the questions, and not the answers, were what the prosecution thought important. The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based." Whether such questions are answered or not, the putting of them is condemned by the courts and text-writers as gross misconduct. (*State v. Rogers, supra*; Wigmore on Evidence, sec. 1808; *State v. Irwin, supra*; *Gargill*

v. Commonwealth, 12 Ky. Law Rep. 149, 13 S. W. 916; *People v. Grider*, 13 Cal. App. 703, 110 Pac. 586; *Watson v. State*, 7 Okl. Cr. 590, 124 Pac. 1101; *People v. Wells*, *supra*.) And we do not think the case is aided by the fact that similar questions put to witnesses previously called, as was the fact in one or two [4] instances, were permitted to pass unchallenged. By overruling the objection, the trial judge not only signified the opinion that the statement of fact embodied in the interrogatory was relevant and material, but stamped with approval the course pursued by the county attorney, thus emphasizing the error committed. The failure of counsel to object earlier did not justify the court in permitting further error; nor did his failure to renew his objection thereafter when the same or similar questions were put to other witnesses. The objection should have been sustained and all similar questions subsequently asked should have been excluded. When a party has seasonably objected to evidence of a certain character and his objection has been overruled, proper decorum would indicate that he should not thereafter interrupt the course of the trial by constant repetition of his objection. (*Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526.)

Counsel for the defendant introduced the depositions of four witnesses who reside at Boise, Idaho, for the purpose of showing that the reputation of the deceased for peace was bad. All of them gave testimony to the effect that one Robert Johnson, who had for some years and until the latter part of the year 1911 been a resident of Boise, was reputed to be a turbulent, violent man. One of these witnesses was asked to attach to his deposition a photograph of Johnson, marking it with the initials of his name so as to identify it. This he did. Upon objection by the county attorney the photograph was excluded on the ground that it was irrelevant and immaterial. Counsel also offered the testimony of witnesses who knew the deceased, to identify the photograph as his. This was rejected on the same ground, the court remarking that it was the province of the jury to determine whether or not it was a photograph of

the deceased. The evident purpose of the offer was to render the evidence contained in the depositions of avail to the defendant, by showing definitely that the deceased was the same person to whose character they had testified. As it was not permitted to go to the jury with some evidence as to whose picture it was, the jury had no office to perform with reference to it, and the evidence of all these witnesses, as to the character of the deceased was in effect rendered worthless because there was nothing to identify the deceased as the man about whom the witnesses spoke, except the slight presumption arising from the identity in name. Even this slight presumption was probably wholly neutralized by a remark made by the court during the colloquy with counsel as to the admissibility of the photograph, to the effect that it might be that there were other persons who bore the name of Robert Johnson, thus indicating an opinion that there should be some evidence identifying the deceased as the man who had formerly resided in Idaho. The ruling was erroneous. While there is some diversity in the opinions of the [5] courts as to whether evidence of the reputation of the deceased is competent for any purpose unless it is known to the defendant at the time of the homicide (and evidence of such knowledge was not introduced at the trial of this case), the weight of authority, we think, gives support to the rule that when, as in this case, the issue is self-defense and there is doubt as to who was the aggressor, such evidence is admissible in order to enable the jury to resolve the doubt; for it is entirely in accord with every-day experience that a turbulent, violent man is more aggressive and will more readily bring on an encounter than one who is of the contrary disposition. (*State v. Shafer*, 22 Mont. 17, 55 Pac. 526; 1 McClain on Criminal Law, 307; 1 Wigmore on Evidence, sec. 63.) Such evidence serves the same purpose as uncommunicated threats, which are always admissible when the question is in doubt, in order to enable the jury to determine who probably brought on the conflict. (*State v. Shadwell*, 26 Mont. 52, 66 Pac. 508; *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035; *State v. Whitworth*, 47 Mont. 424,

133 Pac. 364.] This much we have taken occasion to say touching the competency of the evidence in question in order to answer the argument of the attorney general who undertakes in his brief to justify the ruling on the ground that the reputation of the deceased is never competent unless it is first shown to have been known to the defendant.

It is the general rule, also, not questioned anywhere so far as we are aware, that when a photograph is shown to be a fair [6, 7] and correct representation of a person whose identity is in question, it is admissible to identify such person. That it is a fair and correct representation may be shown by the person who made it or by any competent witness. (McClain on Criminal Law, sec. 406; Underhill on Criminal Law, sec. 50; 1 Wigmore on Evidence, 660; *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Crandall*, 125 Cal. 129, 57 Pac. 785; *People v. Grill*, 151 Cal. 592, 91 Pac. 515; *State v. Roberts*, 28 Nev. 350, 82 Pac. 100.) In the case of *People v. Durrant*, *supra*, the witness who testified as to the character of the photograph in question was a sister of the deceased, and we think the court properly held that her testimony to the effect that it fairly represented the appearance of the deceased at the time of her death was entirely sufficient to warrant its admission. That the one offered here was such a representation of the deceased was not questioned. Besides, the witnesses whose evidence was offered as preliminary proof of its character apparently knew the deceased well in his lifetime. By excluding it the court virtually excluded the testimony of all the Idaho witnesses; and though there was some testimony by other witnesses, of the same import as that thus excluded, this did not render the error harmless. (*State v. Shadwell*, *supra*.) Nor was the photograph rendered inadmissible by the fact that it bore upon it some evidence that it had been taken while the deceased was an inmate of the state prison in Idaho. It appeared incidentally from the testimony of the witnesses, one of whom was the warden of the prison, that the deceased had served two terms in the prison. The warden testi-

fied that his observation of the deceased had been had and his acquaintance with him acquired, mainly during the imprisonment of the latter. This evidence went in without objection. It was not relevant to the inquiry in hand, and we think counsel, in the form of the interrogatories submitted to the witnesses, undertook to give undue prominence to the fact that deceased was an ex-convict, evidently with the purpose of giving to the jury the impression that he was a bad man. For this reason the court properly struck out several of the interrogatories with the answers to them; nevertheless the evidence as to the reputation of deceased, even though it incidentally appeared from it that he was an ex-convict, being competent and material, it was prejudicial error to exclude the photograph and the evidence identifying it as a correct representation of the deceased. The court should have admitted it for the purpose for which it was offered, under proper restrictions, along with the depositions, after striking out the objectionable portions thereof.

It is argued that prejudicial error was committed in submitting the following instruction: "12. You are instructed [8] that in order to constitute murder of the first degree the killing must have been done and perpetrated with malice aforethought and must have been done willfully, deliberately and premeditatedly, and before the jury are authorized to convict the defendant of the crime of murder in the first degree, they should be satisfied from the evidence in the case beyond a reasonable doubt that the defendant, killed Robert Johnson willfully, deliberately, premeditatedly and with malice aforethought, and you are instructed that if you find from all the evidence in the case beyond a reasonable doubt that the defendant, William Jones, shot and killed Robert Johnson on or about the 31st day of March in this year in the county of Lewis and Clark, in the state of Montana, with malice aforethought, willfully, deliberately and premeditatedly, and that he was not justified or excused for so doing, then you should find the defendant guilty of murder in the first degree." The criticism made is that the obligation resting upon the jury to be satisfied of the guilt of

the defendant beyond a reasonable doubt before they may find him guilty is absolute, whereas by the use of the term "should," instead of "must," the court left it discretionary with the jury to convict, whether they were so satisfied or not. The same criticism is made of instructions 13 and 14, as to the duty of the jury to acquit in case they should not be so satisfied. We think the contention is without substantial merit. But for the fact that we feel impelled to order a new trial because of error in the rulings upon the questions of evidence heretofore discussed, we should not deem the contention deserving of any notice. Of course, it is absolutely necessary that the jury be convinced beyond a reasonable doubt before they can convict, and that the duty to acquit, when the jury is not so convinced, is equally absolute. We venture the assertion that the average juror does not stop to speculate as to the distinctions in the meaning of such terms as "must," "ought" and "should," all denoting moral obligation, but recognizes the obligation of his official duty enjoined by the use of one of them as not differing in any respect from that enjoined by the use of the other. The average juror understands without being told in terms that in no case may a defendant be convicted unless the evidence establishes his guilt beyond a reasonable doubt. For present purposes we deem it sufficient to refer to the discussion of the terms in question, found in *State v. Blaine*, 45 Mont. 482, 124 Pac. 516, as conclusive against the contention of counsel. We suggest, however, that it is always wiser and safer for a trial court to use such terms in the formulation of its instructions as will inform the jury as to the full measure of their duty as well as the limitations imposed upon them by law.

Contention is made that the court erred in submitting the following instruction: "You are instructed that no provocation [9] by words only, however opprobrious or threatening, will mitigate an intentional killing, so as to reduce the killing to manslaughter." The objection interposed to it in the trial court was that there was no evidence in the case rendering this instruction necessary or proper. As we have already pointed out, un-

der the evidence, as we view it, the homicide was either murder or entirely justifiable. There is no ground in the evidence for any other conclusion. Davis testified that the defendant drew his revolver and shot the deceased without any words of threat or opprobrium by either. The defendant testified that the deceased, after applying to him an opprobrious epithet, first struck him and then shot him. While, therefore, it was entirely proper for the court in its instructions to define and distinguish the various grades of homicide as it did, and thus enable the jury to reach a correct conclusion (*State v. Shafer*, 26 Mont. 11, 66 Pac. 463), it would also have been proper to instruct them that if they were not satisfied that the homicide was murder, they should acquit the defendant. It was therefore neither necessary nor proper for the court to submit such an instruction as the one in question, when there was no evidence to which it could apply. (*State v. Calder*, 23 Mont. 504, 59 Pac. 903; *State v. Mitten*, 36 Mont. 376, 92 Pac. 969.) For this reason the instruction ought to have been refused. Counsel discuss somewhat at length in their brief the question whether the instruction is correct in point of law. This objection was not made in the trial court. We shall therefore not undertake to determine whether it is or not, because the question is not properly before us.

Complaint is made that the defendant was prejudiced by the [10] following instruction: "The law is that where a number of witnesses testify directly opposite to each other, the jury is not bound to regard the weight of the evidence as evenly balanced. The jury have the right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit and to give credit accordingly." It is said that the instruction as a whole permitted the jury to weigh the evidence under the rule applicable to civil cases, and, having so weighed it and ascertained on which side the scale preponder-

start to decide the case accordingly. It is also said that it is for this reason in direct conflict with other instructions in which the jury were told that in order to convict the evidence must satisfy them of defendant's guilt beyond a reasonable doubt. The court had already properly instructed the jury as provided by the statute (Rev. Codes, sec. 5425) that they were not bound to decide in conformity with the declarations of any number of witnesses which did not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds. To this was added the second sentence of the instruction in question. This was entirely sufficient for all purposes. We agree with counsel that their criticism of the instruction in both particulars is justified. Even if it did not suggest an erroneous measure for the *quantum* of evidence necessary to warrant a conviction, it was well calculated to mislead and confuse the jury. From any point of view, such an instruction has no place in a criminal case.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

IN RE HUSTON'S ESTATE. CARROLL, APPELLANT, v.
HUSTON, RESPONDENT.

(No. 3,360.)

(Submitted February 6, 1914. Decided February 24, 1914.)

[139 Pac. 458.]

Domestic Relations—Husband and Wife—Marriage—Evidence of Cohabitation—Insufficiency—Presumption of Legality.

Marriage—When Void.

1. A marriage contracted while the man had a wife living with whom he was at the time in correspondence relative to a divorce, of which fact, however, the woman was ignorant, was void under section 3612, Revised Codes.

[As to what marriages are void, see note in 79 Am. St. Rep. 361. As to rights of parties to void marriage, see notes in 96 Am. St. Rep. 267; Ann. Cas. 1913A, 236.]

Same—Evidence of Cohabitation—Insufficiency.

2. Evidence *held* insufficient to show that "public assumption of the marital relation" which the law (sec. 3607, Rev. Codes) demands in the absence of a solemnization, in order to constitute a valid marriage, it appearing that the cohabitation of the parties was clandestine.

[As to what constitutes common-law marriage, see notes in 124 Am. St. Rep. 104; Ann. Cas. 1912D, 597.]

Same—Validity of, in Sister State—Effect of, in Montana.

3. Under section 3614, Revised Codes, recognizing as valid all marriages entered into without this state, if valid under the laws of the state or country in which they were contracted, evidence of cohabitation *held* sufficient to create a presumption of a legal marriage in the state of Washington; hence the status of the parties in this state was that of husband and wife.

[As to foreign marriages, see note in Ann. Cas. 1912C, 625.]

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

FROM an order granting the petition of Annie B. Huston to administer upon the estate of Robert G. Huston, deceased, and revoking special letters therefor granted to J. L. Carroll, the latter appeals. Affirmed.

Mr. Lewis A. Smith, for Appellant, submitted a brief, and argued the case orally.

Where it is proved that a man and woman were legally married; that the marriage was never dissolved in the jurisdiction in which they lived, and that she has no personal knowledge of his obtaining a divorce, the presumption is that a second marriage contracted by him during her life is void. (*Cole v. Cole*, 153 Ill. 585, 38 N. E. 703; *Barnes v. Barnes*, 90 Iowa, 282, 57 N. W. 851.)

According to all the evidence, we have here an absolutely void marriage being secretly guarded by both parties to it during all the time they were in Montana. So it seems certain that in Montana there never was that "personal relation arising out of a civil contract to which the consent of the parties capable of making it is necessary * * * followed by * * * mutual and public assumption of the marital relation." (Sec. 3607, Rev. Codes; *O'Malley v. O'Malley*, 46 Mont. 549, 129 Pac. 501; *Kilburn v. Kilburn*, 89 Cal. 46, 23 Am. St. Rep. 447, 26

Pac. 636; *Quackenbush v. Swortfiguer*, 136 Cal. 149, 68 Pac. 590; *Hinckley v. Ayres*, 105 Cal. 357, 38 Pac. 735; *Harron v. Harron*, 128 Cal. 303, 60 Pac. 932; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.) The legislature of California has, since the last case cited above, wisely done away with the so-called common-law marriage, as has New York and many other states.

The validity of a marriage is determined by the law of the place where it is celebrated. (*Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81; *Patterson v. Gaines*, 47 U. S. 550, 12 L. Ed. 553; *In re Tabor*, 31 Misc. Rep. 579, 65 N. Y. Supp. 571; *Phillips v. Gregg*, 10 Watts (Pa.), 158, 36 Am. Dec. 158.) The Toledo marriage having been void from the beginning, it could not be ratified. (Sec. 3612, Rev. Codes; *Petitt v. Petitt*, 105 App. Div. 312, 93 N. Y. Supp. 1001; *Wilbur's Estate v. Bingham*, 8 Wash. 35, 40 Am. St. Rep. 886, 35 Pac. 407.)

Mr. B. K. Wheeler, and *Messrs. Canning & Geagan*, for Respondent, submitted a brief; *Mr. Wheeler* argued the cause orally.

There is no evidence in this case that the so-called first marriage was a legal one or that Sarah E. Huston was legally competent to marry, or that Robert G. Huston, the person whom she claims to have married, is the same person whose estate is now in question. The burden is upon the appellant to prove a valid prior marriage; this he has not done. (*Gaines v. Relf*, 12 How. (U. S.) 472, 13 L. Ed. 1071; *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084; *Resnick v. Resnick*, 126 Ill. App. 132; *United States v. Green*, 98 Fed. 63.) If there was a prior valid legal marriage existing between deceased and Sarah E. Huston, the court was justified in finding that it had been dissolved by divorce. In *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742, the court said: "The presumption in favor of matrimony is one of the strongest known to the law. The law presumes morality and not immorality, marriage and not concubinage, legitimacy and not bastardy." (*In re Rash's Estate*, 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312.) In the following

cases it has been held that where a former marriage is shown to exist, it will be presumed that the same has been dissolved by death or divorce: *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742; *Pittinger v. Pittinger*, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195; *Klein v. Laudman*, 29 Mo. 259; *Greensborough v. Underhill*, 12 Vt. 604; *Hunter v. Hunter*, 111 Cal. 261, 52 Am. St. Rep. 180, 31 L. R. A. 411, 43 Pac. 756; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232.

Where parties incompetent to marry enter into a marriage contract with a manifest desire and intention to live in a matrimonial union rather than in a state of concubinage, and the obstacle of their marriage is subsequently removed, their continued cohabitation raises a presumption of an actual marriage immediately after the removal of the obstacle and warrants a finding to that effect. (*The Breadalbane Case (Campbell v. Campbell)*, L. R. 1 Scotch App. 182, 206; *De Thoren v. Attorney General*, L. R. 1 App. Cas. 686; *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *In re Taylor*, 9 Paige Ch. (N. Y.) 611; *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106; *Donnelly v. Donnelly's Heirs*, 8 B. Mon. (Ky.) 113; *State v. Worthingham*, 23 Minn. 528; *Floyd v. Calvert*, 53 Miss. 37; *Jones v. Jones*, 45 Md. 144; *Yates v. Houston*, 3 Tex. 433; *Barnes v. Barnes*, 90 Iowa, 282, 57 N. W. 851; *Adger v. Ackerman*, 115 Fed. 124, 52 C. C. A. 568.)

Counsel lays stress on the fact that the deceased made declarations to disprove his marriage, but by the weight of authority such declarations are inadmissible, and went in evidence over objection of counsel. (See *Thompson v. Nims*, 83 Wis. 261, 17 L. R. A. 847, 53 N. W. 502; *Moore's Estate*, 9 Pa. Co. Ct. 338; *Hull v. Rawls*, 27 Miss. 471; *In re James*, 124 Cal. 653, 57 Pac. 578, 1008.)

Counsel seems to contend that the mutual public assumption must be in Montana, but the court cannot take such a contention seriously. Supposing the parties consented in Montana to be husband and wife and immediately went to the state of Washington and there publicly and mutually assumed the marriage

relation, could it be said that the public acknowledgments in Washington could not be used in evidence to prove the marriage in Montana? In the case of *Moore v. Holbeck*, 119 Ala. 627, 24 South. 374, it was held that cohabitation in a state where common-law marriages are not recognized may be considered in connection with cohabitation in the state where such marriages are valid in determining the question of marriage. (*In re Dystart Peerage*, L. R. 6 App. Cas. 459.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Robert G. Huston, a resident of Butte, died intestate in Seattle, Washington, on November 1, 1912. Thereafter two petitions were presented to the district court of Silver Bow county, each asking for the appointment of an administrator of the estate—one by a person claiming to be the surviving wife and the other on behalf of a nonresident sister of the deceased. Pending the final determination, appellant was appointed special administrator. The two petitions were heard together, and the result of the trial was an order granting the petition of respondent, denying the petition of the sister and revoking the special letters theretofore granted to appellant. There is an appeal from the order, and the only question for determination is the sufficiency of the evidence to warrant it. There is not any substantial dispute as to the facts.

In the fall of 1910 Huston and Mrs. Annie B. King—a divorced woman—left Butte together for the national encampment of the G. A. R. at Atlantic City, New Jersey. They stopped in [1, 2] Toledo, Ohio, and there were married by a Methodist minister according to law. They continued their journey, living and cohabiting together as husband and wife. Huston returned to Butte almost immediately, but the woman stopped in Michigan until the following March. During this period of separation many letters passed between them, and in practically every one written by Huston he referred to the woman as his wife and addressed her in the most endearing terms. In March,

1911, she returned to Butte and took up her residence in the Penn Block, in which block Huston had his business office and his living room. A part of the time thereafter Huston occupied her apartments with her; took his meals with her most of the time; paid her room rent and store bills, and was in her company upon the streets, at the markets and theaters a great deal. To three or four acquaintances Huston told that he and the former Mrs. King were married, but to two of these at least the information was imparted in confidence and from them a pledge of secrecy was exacted. To one or two other persons he referred to the woman as his wife, but to his business associates and to the public generally he invariably referred to her as Mrs. King, and the fact that they were cohabiting together was kept a profound secret so far as they were concerned. This course of conduct was pursued until Huston left for the coast in September, 1912. In October following he became confined in the Providence Hospital, Seattle, where he died. About the time he went to the hospital he sent for the former Mrs. King to come to him, and with his letter inclosed a check for \$100 to defray her expenses. The check was made payable to Annie B. King, and was cashed by her by indorsing the name "Annie B. King." She immediately left Butte and arrived in Seattle on October 19 or 20. On the following morning she took up her abode at the hospital and until Huston's death gave him every attention that a wife could bestow upon her husband. Upon her arrival Huston introduced her to the hospital attendants and to others as his wife; was introduced by her to her friends as her husband, and in return recognized her to them as his wife. She occupied the same room with him during the time they were at the hospital, and for the last nine days of his life her attention to him was so constant that, to use her language, she did not undress during that time. This, in very general terms, covers the principal points of the evidence of their relationship.

At the time the marriage ceremony was performed in Toledo Huston had a wife—Elizabeth—living in Portland, Oregon. He

knew her address and was then in correspondence with her relative to a divorce. Of these facts, however, Mrs. King was ignorant until after Huston's death. He represented to her that he had been divorced, and she entered into the marriage relationship in good faith, believing a valid marriage had been contracted. She had entered public land in the name of Annie B. King and sought to keep the marriage a secret until she could make final proof. In May, 1911, Elizabeth Huston secured a divorce in Oregon.

Section 3612, Revised Codes, provides: "A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any other person than such former husband or wife, is illegal and void from the beginning, unless: 1. The former marriage has been annulled. 2. Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal."

So far as the Toledo ceremony is concerned, it is of no aid to respondent in her attempt to establish her claim as the surviving widow of Robert G. Huston, deceased, by a marriage contracted prior to the trip to Seattle in October, 1912. Whatever may be said of the evidence as to their conduct to each other in Butte after May, 1911, when Huston's disability was removed, this fact is indisputable: that their assumption of the marital relationship—their cohabiting as husband and wife—was clandestine.

Section 3607, Revised Codes, provides: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by mutual and public assumption of the marital relation." At the time the ceremony was performed in Toledo,

Huston was incapable of contracting a valid marriage. There was not any further ceremony performed for them in Montana, and assuming that they mutually agreed upon their immediate marriage as soon as the disability was removed, the evidence above is insufficient to show that public assumption of the marital relation which our statute demands.

Section 3614, Revised Codes, provides: "All marriages contracted without the state, which would be valid by the laws [3] of the country in which the same were contracted, are valid in this state." If, then, these parties were married in Washington, the courts of this state will recognize the relationship, even though it be such a marriage as that, if contracted in this state, it would not be valid under our laws. The question before us is: Are the facts above enumerated sufficient to make out a *prima facie* case of marriage in Washington? The statutes of that state are not before us, and it is insisted by appellant that a common-law marriage is not valid there.

In 1892 the question of the validity of a common-law marriage in Washington was presented to the supreme court, apparently as one of first impression in that jurisdiction. An elaborate opinion was prepared and the conclusion reached that the statutes contemplate a ceremonial marriage only, and that a common-law marriage is not valid there. (*In re McLaughlin's Estate*, 4 Wash. 570, 16 L. R. A. 699, 30 Pac. 651.) That decision is referred to in *Smith's Estate*, 4 Wash. 702, 17 L. R. A. 573, 30 Pac. 1059; in *Kelley v. Kitsap County*, 5 Wash. 521, 32 Pac. 554, and in *Wilbur's Estate*, 14 Wash. 242, 44 Pac. 262.

In *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84, very slight evidence that a ceremony had been performed in British Columbia was held sufficient with evidence of cohabitation by the parties as husband and wife to establish a marriage.

In *Shank v. Wilson*, 33 Wash. 612, 74 Pac. 812, the date of a marriage was the question in issue. Appellants proved a ceremonial marriage celebrated on June 4, 1900. Respondent offered evidence that the parties had lived and cohabited together as husband and wife and held themselves out as such for sev-

eral years prior to that time. It was held that these facts raised a presumption that a valid statutory marriage had preceded such acts and that this presumption was not overcome by positive proof of the marriage celebrated in June, 1900.

In *Nelson v. Carlson*, 45 Wash. 351, 84 Pac. 477, there was not any evidence whatever that a marriage ceremony had ever been celebrated between John Nelson and Christina Alida Carlson. The only evidence was that for several years before the woman's death they lived and cohabited as husband and wife, were recognized as such by their neighbors, that they joined in conveyances as husband and wife and upon the death of the woman, Nelson had a headstone erected at the grave upon which her name was inscribed as Mrs. Nelson. The court held that this evidence was sufficient to establish the marriage. A somewhat similar case, with the same result, is *McDonald v. White*, 46 Wash. 334, 89 Pac. 891.

In the *McLaughlin Case* above the court said: "In all cases, whether common-law marriages are recognized or not, evidence of cohabitation and repute is admissible as tending to show a valid marriage; holding each other out as husband and wife to the public, and continued living together in that relationship has ordinarily, if not universally, been held sufficient proof, unless contradicted, to establish it, even within those states where common-law marriages are not recognized. This presumption could always be rebutted, however, by showing that the parties intended their connection to be illicit, and, if it was so intended at its commencement, it is presumed to continue, unless evidence is produced of a change of mind." It then quotes, and apparently with approval, sections 970-975 and 979 from 1 Bishop on Marriage, Divorce and Separation.

In the *Summerville Case* above, the court quotes from 1 Bishop on Marriage, Divorce and Separation, section 956, as follows: "Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a strong presumption of its legality; not only casting the burden of proof

on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of this presumption, the truth of law and fact that it is illegal and void. * * * It being for the highest good of the parties, of the children and of the community, that all intercourse between the sexes in form matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all probabilities, and presses into its service all things else which can help it, in each particular case, to sustain the marriage, and repel the conclusion of unlawful commerce." The court then concludes: "A valid marriage may be presumed to exist from general reputation among the acquaintances of the parties that such is the fact, when that reputation is accompanied by their cohabitation, and arises from their holding themselves out to the world as occupying that relation to which the law refers when marriage is mentioned."

In *Shank v. Wilson* the court said: "It is well-established law, not necessitating the citation of authority, that the proof of continual cohabitation of a man and woman, and of a continual assertion that the marriage relation exists, and proof of such conduct as is consistent with the marriage relation, raises the presumption in those states where the common-law marriage itself is not held to be a legal marriage, that the ceremonial or legal marriage has preceded the acts mentioned." It also reaffirms the doctrine announced in section 956 of Bishop as quoted in the *Summerville Case*.

In *Potter v. Potter*, 45 Wash. 401, 88 Pac. 625, the question whether there had been a marriage ceremony performed was in sharp dispute. The court again refers to the decision in the *Summerville Case* and says: "In a conflict of testimony such as is shown by the record in this case, it is well established that a ceremonial marriage may be proven by circumstances, such as the cohabitation of persons as husband and wife, their reputation and recognition as such in society, and that, when such circumstances are shown, the presumption of marriage exists, and the

burden is upon the party denying the marriage to show that the ceremony had never been performed."

In *Sloan's Estate*, 50 Wash. 86, 17 L. R. A. (n. s.) 960, 96 Pac. 684, the court said: "The presumption of marriage, from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality and not immorality; marriage and not concubinage; legitimacy and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence."

In *Thomas v. Thomas*, 53 Wash. 297, 101 Pac. 865, the language of section 956 from Bishop, quoted in *Shank v. Wilson*, and in *Summerville v. Summerville*, is again reproduced with approval.

Finally, in *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822, all the preceding cases are reviewed at length and the court sums up its conclusion upon the status of the law in Washington, as follows: "We have reviewed the cases in this court for the purposes of showing that there is no real conflict between the earlier and later ones on this subject. We have seen that in the *McLaughlin Case* it was stated by Judge Scott that, in the states where common-law marriages are held invalid, a lawful ceremonial marriage may be presumed from cohabitation and reputation. The logic of that case has been liberally applied to the facts in the later cases to uphold the marriage relation, where the parties have lived together as husband and wife, and held themselves out to the public as sustaining that relation. * * *

Whilst language may be found in some of the earlier cases which tends to support the judgment, the uniform and unbroken current of opinion in this court, as we read the cases, has been that, while a common-law marriage is invalid in this state, evidence of cohabitation and reputation is admissible for the purpose of raising the legal presumption of a prior ceremonial marriage." While in the earlier cases it was held that there could not be a common-law marriage in Washington, in *Willey v. Willey*, 22

Wash. 115, 79 Am. St. Rep. 923, 60 Pac. 145, the validity of a common-law marriage contracted in California was upheld in Washington; and in *In re Hollopeter*, 52 Wash. 41, 132 Am. St. Rep. 952, 17 Ann. Cas. 91, 21 L. R. A. (n. s.) 847, 100 Pac. 159, where there was involved the validity of a marriage between Grover, a youth of nineteen, and Imogene, a girl of fourteen, without parental consent, the marriage was upheld and the court said: "Imogene was within the common-law age of consent, so that we cannot hold as a matter of law, as did the lower court, that she was incapable of consenting to the marriage." And this in the face of a statute which provides: "Marriage is a civil contract which may be entered into by males of the age of twenty-one years, and females of the age of eighteen years who are otherwise capable." (Rem. & Bal. Ann. Codes of Washington, sec. 7150 (4467).) If the evidence of this case had been presented to the courts of Washington, we are satisfied that they would have held it sufficient to create a presumption that Huston and Mrs. King had been legally married.

The same authorities cited by the Washington court in the cases above were cited and relied upon by this court in *Hadley v. Rash*, 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312, where was called in question the validity of the second marriage of Daniel Rash. The court held that evidence that Rash had married the second wife and had lived and cohabited with her would raise the presumption of a divorce from the first wife and a valid second marriage. "That a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage" is one of the presumptions declared by section 7962, Revised Codes (30).

Because in our opinion the evidence is sufficient to disclose a marriage valid in Washington at the time of Huston's death, we are compelled to recognize this respondent as his surviving widow. For this reason the order above is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

SCOTT, RESPONDENT, v. WAGGONER ET AL., APPELLANT.

(No. 3,342.)

(Submitted February 6, 1914. Decided February 26, 1914.)

[139 Pac. 454.]

Pleading and Practice—Counterclaim—Statutes—Liberal Construction—Torts—Contracts—Conversion—Demand—Refusal—Instructions.

New Trial—Affirmance, When.

1. Where a new trial, asked for on several grounds, is granted in an order general in terms, it will be affirmed if it can be justified upon any one of the grounds stated in the notice of intention.

Counterclaim—Statutes—Liberal Construction.

2. Section 6540, Revised Codes, providing that an answer may contain a statement of new matter constituting a counterclaim, and section 6541 defining the nature of such counterclaim, must be liberally construed, they being designed to enable parties litigant to adjust their differences in one action, and thus to prevent a multiplicity of suits.

[As to scope and office of counterclaim, see note in 89 Am. Dec. 482.]

Same—Contracts—Torts—Pleading.

3. *Held*, that a counterclaim sounding in tort may be pleaded as against a demand upon contract, provided it arises out of the transaction which gave rise to plaintiff's cause of action.

Same—Contracts—Conversion—Pleading.

4. Under the rule declared in paragraph 3, *supra*, in an action by a landlord for rent due under a written lease and for damages for waste committed on the premises, a counterclaim for the conversion of personal property placed thereon by defendants was proper.

Same.

5. The counterclaim above referred to, *held* not obnoxious to the rule that a cause of action pleaded as upon a right in favor of two or more persons jointly is not sustained by proof of a right in one of them.

Actions—Issues—Determinable as of What Date.

6. All issues must be determined as of the date of the commencement of the action.

Counterclaim—Pleadable When.

7. Unless a counterclaim exists and is matured at the time the action in which it is sought to interpose it is commenced, it cannot be pleaded.

Same—Conversion—Demand and Refusal.

8. In an action by a landlord against his tenant for breach of a contract of lease, a cause of action constituting a counterclaim for the conversion of personal property belonging to the lessees and alleged to have been taken by plaintiff upon re-entry of the premises, arose only after demand and refusal to redeliver, provided the re-entry was justified; if not justified, a conversion occurred at the time of re-entry, irrespective of demand.

[As to what constitutes conversion of personalty, see notes in 15 Am. Dec. 151; 24 Am. St. Rep. 795. As to necessity of demand to support action of trover, see notes in Ann. Cas. 1913A, 1105, 1108.]

Instructions—To be Viewed as a Whole.

9. Instructions must be viewed as a whole where error in giving and refusing certain of them is relied on for a reversal of the judgment.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

ACTION by Ida D. Scott against A. W. Waggoner and others. From a judgment for plaintiff, and an order granting a new trial, defendants appeal. Appeal from judgment dismissed. Appeal from order granting new trial affirmed.

Messrs. Scharnikow & Paul, and Mr. L. W. Jordan, for Appellants, submitted a brief; Mr. Jordan argued the cause orally.

If the counterclaim, as pleaded by the defendants, arose out of the transaction set forth in the complaint, as the foundation of the plaintiff's claim, then the court erred in sustaining plaintiff's motion for a new trial. The lease was the transaction which was the very foundation stone of plaintiff's claim. The counterclaim is for a violation of a right which also grew out of the relations established by the lease, and is therefore a cause of action arising out of the transaction which is the foundation of plaintiff's claim. (*Gilbert v. Loberg*, 86 Wis. 661, 57 N. W. 982; *Vilas v. Mason*, 25 Wis. 310; *Gutzman v. Clancy*, 114 Wis. 589, 58 L. R. A. 744, 90 N. W. 1081; *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505; *Ludlow v. McCarthy*, 5 App. Div. 517, 38 N. Y. Supp. 1075; *York v. Steward*, 21 Mont. 515, 43 L. R. A. 125, 55 Pac. 29; *Harmony Co. v. Rauch*, 62 Ill. App. 97.)

In an action for rent, a cause of action for taking defendant's goods and holding them for, or applying them upon, the rent sued upon is to be deemed as arising out of the same transaction within the rule as to counterclaims. (*Littman v. Coulter*, 23 Abb. N. C. (N. Y.) 60, 7 N. Y. Supp. 1.)

In an action against a tenant for carrying away certain articles forming a part of the property leased, a counterclaim for the value of articles owned by the defendants, but which plaintiff refused to allow him to remove when he surrendered possession of the premises, is good. (*Vilas v. Mason*, 25 Wis.

210.) Where the lessee is damaged by the disturbance of his possession by the lessor, the court will not drive the lessee to his action for trespass for the recovery of such damages. The damages resulting from a breach of the covenant for quiet enjoyment arise out of the contract of leasing; and in an action by the lessor upon a lease for rents due, such damages may be recovered by way of counterclaim. (*Healey v. Banks*, 6 Okl. 79, 51 Pac. 664.) Defendant, in an action for rent, may set up as a counterclaim an eviction from a part of the demised premises, in consequence of which he sustained damages consisting of the destruction of certain property then on the land. (*Ludlow v. McCarthy*, *supra*.) In an action to recover an installment of rent due on a lease, defendant may recoup damages he may have sustained in consequence of any breach of the covenants in the lease on the part of plaintiff. (*Pepper v. Bowley*, 73 Ill. 262.)

The word "transaction," as used in subdivision 1 of section 6541, Revised Codes, is not limited to the facts set forth in the complaint, but includes the entire series of acts and mutual conduct of the parties in the business or proceeding between them, which formed the basis of the agreement. (34 Cyc. 686; 22 Am. & Eng. Ency. of Law, 1st ed., 391-393; *Story & Isham Com. Co. v. Story*, 100 Cal. 30, 34 Pac. 671; *Advance Thresher Co. v. Klein*, 25 S. D. 177, 133 N. W. 51; *Craft Refrigerating Mach. Co. v. Quinnipiac Brew. Co.*, 63 Conn. 551, 25 L. R. A. 856, 29 Atl. 76; *King v. Coe Commission Co.*, 93 Minn. 52, 100 N. W. 667.) The word "transaction," being placed in an immediate connection with the word "contract" and separated therefrom the disjunctive "or," the legislature intended by it something different from "contract," for the most familiar rules of textual interpretation would be violated by the assumption that no such significance was intended. (*De Ford v. Hutchinson*, 45 Kan. 318, 11 L. R. A. 257, 25 Pac. 641.) Every contract is a transaction, but every transaction is not a contract. (*Sheehan v. Pierce*, 70 Hun (N. Y.), 22, 23 N. Y. Supp. 1119; *Xenia Branch Bank v. Lee*, 2 Bosw. (N. Y.) 694, 7 Abb. Pr. 372.) And the "contract" is the result of a transaction, while the "transac-

tion" covers all things done and said which results in a contract. (*De Ford v. Hutchinson, supra.*) The term "transaction" is more extensive than "a cause of action" or "subject of the action," for out of it the defendant's cause of action is said to arise. (Pomeroy on Remedies, 2d ed., 818, sec. 774.)

The counterclaim in the answers of the defendants is one which can be pleaded by the defendants, for their liabilities are joint and several. (Pomeroy's Code Remedies, sec. 634; 34 Cyc. 731; *Parsons v. Nash*, 8 How. Pr. (N. Y.) 454.)

When principal and surety are sued jointly upon their obligations it is generally held that the principal may set off a judgment or demand due him from the plaintiff. (*Temple Street Ry. Cable Co. v. Hellman*, 103 Cal. 634, 37 Pac. 530; *Harrison v. Henderson*, 4 Ga. 198; *Hayes v. Cooper*, 14 Ill. App. 490; *Reeves v. Chambers*, 67 Iowa, 81, 24 N. W. 602; *Field v. Maxwell*, 44 Neb. 900, 63 N. W. 62; *Springer v. Dwyer*, 50 N. Y. 19; *Wagner v. Stocking*, 22 Ohio St. 297; *Hollister v. Davis*, 54 Pa. 508.)

Mr. W. E. Keeley, and *Mr. S. P. Wilson*, for Respondent, submitted a brief; *Mr. Wilson* argued the cause orally.

Subdivision 1 of section 6541, Revised Codes, has been construed as referring to the origin and ground of plaintiff's right to recover or obtain the relief asked for, rather than as relating to the thing itself about which the controversy has arisen. (*Collier v. Ervin*, 3 Mont. 142; *Potter v. Lohse*, 31 Mont. 91, 77 Pac. 419.) The subject of the counterclaim is entirely independent, distinct and separate from the origin or ground of plaintiff's right of recovery. The basis of the counterclaim is the alleged wrongful acts of plaintiff done at a time long after the termination of the contract upon which plaintiff sued. It may be urged that if it were not for the lease in question, defendant Melvina Waggoner would not have placed her property within the reach of the plaintiff and the temptation to the plaintiff of being guilty of conversion would not have existed, and probably the conversion would not have then occurred; yet the mere

incident that the conversion was committed at the same place where the original contract was to be performed cannot of itself sufficiently connect the conversion with the origin and ground of plaintiff's right to recover so as to make it a lawful counterclaim under subdivision 10. (*Goldberger v. Leibowitz*, 42 Colo. 99, 93 Pac. 1168; *Kennett v. Pickel*, 41 Kan. 211, 21 Pac. 93; *Marks v. Tomkins*, 7 Utah, 421, 27 Pac. 6; *Allison v. Skinner*, 7 Okl. 272, 54 Pac. 471; *Keegan v. Kinnere*, 123 Ill. 280, 14 N. E. 14; *Wells v. Clarkson*, 2 Mont. 379; *Osmers v. Purey*, 32 Mont. 593, 81 Pac. 345; *Brugman v. Burr*, 30 Neb. 406, 46 N. W. 644.)

While it has been held to the contrary, we think the prevailing and best considered rule is that a claim, in order to be available as a counterclaim, must be a demand in favor of the defendant upon which he might have maintained an independent action against the plaintiff at the time of the commencement of the action, in which he seeks to interpose a counterclaim. (*Howze v. Davis*, 76 Ala. 381; *Ellis v. Cothran*, 117 Ill. 458, 3 N. E. 411; *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. 655; *Godkin v. Weber*, 158 Mich. 515, 122 N. W. 1083; *Gurske v. Kelpin*, 61 Neb. 517, 85 N. W. 557.) In *Youngernan v. Long*, 95 Iowa, 185, 63 N. W. 674, it was held that damages alleged to have been sustained by defendant by the wrongful issuance of a writ of attachment contemporaneous with the institution of the suit could not be allowed as a counterclaim, the same not being in existence at the time the action was commenced. To the same effect, see *Esbensen v. Hover*, 3 Colo. App. 467, 33 Pac. 1008; *Rumsey v. Robinson*, 58 Iowa, 225, 12 N. W. 243; *Tessier v. Englehart*, 18 Neb. 167, 24 N. W. 734. In *Orton v. Noonan*, 29 Wis. 541, the court held that a counterclaim for damages caused after the commencement of an action for rent by the breach of the plaintiff's covenant to keep the demised premises in repair could not be allowed. (See, also, *Strehlow v. McCleod*, 17 N. D. 457, 17 Ann. Cas. 423, 117 N. W. 525.)

The obligation of the Waggoners was a joint obligation. Such being the case, a counterclaim existing in favor of one only of

the joint obligors was not the proper subject of counterclaim in an action upon lease. This is the rule laid down in California, in the United States supreme court and in this state. (*Kemp v. McCormick*, 1 Mont. 420; *Collier v. Ervin*, *supra*; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; *Hook v. White*, 36 Cal. 299; *Brown v. Daly*, 33 Mont. 523, 84 Pac. 883.)

MR. JUSTICE SANNER delivered the opinion of the court.

This proceeding, with its separate appeals from the judgment and from an order granting a new trial in the same case, aptly illustrates one of the anomalies of our appellate procedure. As the effect of an order granting a new trial is to set aside the verdict or other decision upon the facts and thus to abrogate the judgment founded thereon, and as the order granting the new trial in this case was entered before the notice of appeal from the judgment was filed, it would seem that there was no judgment to appeal from. The office of an appeal from the judgment is to present questions of law, but its effect, if successful, is to do what in this case has been done, *viz.*, to abrogate the judgment. The effect of the order appealed from is, of course, conditional, and a reversal of it would operate to restore the judgment; so that, from this point of view, we are asked by one of these appeals to undo what by the other it is sought to have done.

The order granting a new trial was a general one and must be [1] affirmed if it can be justified upon any of the grounds urged in vindication of it and stated in the notice of intention. These are: Error in permitting the defendants to plead and to produce evidence in support of their counterclaim; error in the instructions, and that the verdict is contrary to the evidence.

Plaintiff, for a cause of action, alleges: That on July 25, 1910, she leased by written instrument to A. W. Waggoner and Melvina Waggoner certain premises in the city of Deer Lodge known as the Scott House, "together with certain personal property therein contained," for the term of two years at the rental of \$100 per month; that in consideration of the lease

a bond in the sum of \$1,500 was executed by the Waggoners as principals and by the defendants O'Neil, Mae and Smith as sureties conditioned that the Waggoners should pay the rent and perform all the other agreements imposed upon them by the lease; that the Waggoners entered upon, occupied and used the Sooty House as a hotel from August 1, 1910, to February 1, 1911, when having failed in their hotel business they abandoned the said premises without the permission or consent of the plaintiff and without notice to her or her agents; that at the time of such abandonment there was due plaintiff the sum of \$50 balance of the rent for January, 1911, and \$100 rent for February, 1911, no part of which has been paid; that since August 1, 1911, "many articles of personal property leased by the plaintiff" to the Waggoners "have been broken, destroyed, injured and carried away from the premises and * * * are now not in or about the said premises, and injury and waste has been committed in and about the premises to the property leased," to the plaintiff's damage in the sum of \$240, no part of which has been paid; that notice of all this was given to defendant sureties and payment demanded of them; that there is also due the further sum of \$100 rent for the month of March, 1911, no part of which has been paid. A general demurrer to the amended complaint was filed, submitted and overruled; whereupon two separate answers were filed—one by the Waggoners and one by the other defendants—which answers admitted the execution of the lease and bond, denied all the other allegations of the amended complaint, pleaded certain affirmative defenses based upon an alleged unlawful eviction of the Waggoners by the plaintiff, and closed with a counterclaim which is to the following effect: That the Waggoners "went into the possession of said premises, under and by virtue of said lease aforesaid, and at great cost and expense prepared said premises for the purposes of conducting a hotel and lodging-house therein, and that they refitted and refurnished said building and put into said building under and by virtue of the terms of said lease aforesaid, the following described personal property of the value

of \$350, or more''; that on or about the month of February, 1911, plaintiff, without cause or reason therefor, unlawfully evicted and ousted the Waggoners from the premises and at the same time took and has since kept possession of the personal property above referred to, and has refused to surrender the same or pay the value thereof, notwithstanding the demands of the Waggoners and to their damage in the sum of \$350. To this counterclaim as pleaded by the Waggoners and as pleaded by the other defendants, demurrers and motions to strike were filed, specifically urging that the counterclaim is not of the character specified in section 6541, Revised Codes. These demurrers and motions were overruled and the essential allegations of the counterclaim were put in issue by replies.

It is stated in the brief of appellants, though without any warrant apparent in the record, that the new trial was granted because in the opinion of the district judge the counterclaim was [2] not a proper one, and to this much argument is directed. Section 6540, Revised Codes, provides, among other things, that an answer may contain a statement of any new matter constituting a counterclaim, but such counterclaim "must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action: (1) A cause of action arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action on contract, any other cause of action on contract, existing at the commencement of the action." (Sec. 6541.) That these provisions are designed to enable parties litigant to adjust their differences in one action, so far as that can logically be done, and thereby to prevent multiplicity of suits, is made plain by the further provision that if the defendant omit to set up a counterclaim in the classes mentioned in subdivision 1 of section 6541, neither he nor his assignee can afterward

maintain an action against the plaintiff therein. See 654.; For statutes so largely remedial a liberal and liberal construction is required in order that the purposes designed by them shall be most completely served.

1. Thus promising we take to the declaration of respondent that "the counterclaim of defendants was a cause of action in tort [3, 4] for conversion of personal property and therefore not the proper subject of counterclaim against plaintiff's cause of action upon contract." In the prolonged effort to achieve full understanding of the true meaning and purpose of the reformed procedure many decisions have been promulgated which give countenance to this view; but we think that it cannot be correct. Subdivision 1, above quoted, specifies three things as possible bases of counterclaim, viz., the contract sued on, the transaction set forth and the subject of the action. Either these things are different and distinct, or the provision is "a misleading tautology." Elementary rules of interpretation require that some different significance be given to these terms; but if they are different and distinct, then counterclaims may exist which do not sound in contract. The reason assigned for the doctrine that a counterclaim sounding in tort cannot be pleaded as against a demand upon contract is the supposed impossibility of legal connection between the two events; but every money demand is either upon contract or upon tort, and the same reason may be and is assigned with stronger emphasis for denying the right to plead a counterclaim in tort as against a demand in tort. If a counterclaim in tort cannot be pleaded as against a demand either upon tort or in contract, then, in the case of money demands we have a counterclaim which is not a counterclaim—a conclusion which cannot be accepted. As pointed out by Mr. Pomeroy (Code Remedies, Div. 6, subd. 1), the solvent of the difficulty lies in the breadth and scope of the terms "transaction" and "subject of the action." The term "transaction" is not legal and technical—it is common and colloquial; it is therefore to be construed according to the context and to approved usage. (Rev. Codes, sec. 8070.) As so construed it is broader

than "contract" and broader than "tort," although it may include either or both; it is "that combination of acts and events, circumstances and defaults, which, viewed in one aspect, results in the plaintiff's right of action, and viewed in another aspect, results in the defendant's right of action" (Pomeroy's Code Remedies, sec. 774), and it "applies to any dealings of the parties resulting in wrong, without regard to whether the wrong be done by violence, neglect or breach of contract." (34 Cyc. 686; 1 Sutherland on Code Pleading, sec. 633; *Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 25 L. R. A. 856, 29 Atl. 76; *Story & Isham Com. Co. v. Story*, 100 Cal. 30, 34 Pac. 671; *Advance Thresher Co. v. Klein*, 28 S. D. 177, 133 N. W. 51; *Woodruff v. Garner*, 27 Ind. 4, 89 Am. Dec. 477; *King v. Coe Commission Co.*, 93 Minn. 52, 100 N. W. 667.) When in this sense of the word a cause of action in favor of the defendant arises from the "transaction" set forth in the foundation of plaintiff's claim, it is pleadable as a counterclaim, no matter what its technical soundings or those of plaintiff's demand may be. (1 Sutherland on Code Pleading, sec. 635; *Adams v. Schwartz*, 137 App. Div. 230, 122 N. Y. Supp. 41; *Gross v. Hochstim*, 130 N. Y. Supp. 315; *Harrington v. Jaeckel*, 75 Misc. Rep. 653, 133 N. Y. Supp. 933; *Lind v. Demorest*, 116 N. Y. Supp. 656; *Wadley v. Davis*, 63 Barb. (N. Y.) 500; *Barber v. Ellingwood*, 137 App. Div. 704, 122 N. Y. Supp. 369; *Kneeland v. Pennell*, 49 Misc. Rep. 94, 96 N. Y. Supp. 403; *Deagan v. Weeks*, 67 App. Div. 410, 73 N. Y. Supp. 641; *Ter Kuile v. Marsland*, 81 Hun, 420, 31 N. Y. Supp. 5; *Heigle v. Willis*, 50 Hun, 588, 3 N. Y. Supp. 497; *Xenia Branch Bank v. Lee*, 7 Abb. Pr. (N. Y.) 389, 2 Bosw. 694; *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 454; *Gutzman v. Clancy*, 114 Wis. 589, 58 L. R. A. 744, 90 N. W. 1081; *McArthur v. Green Bay etc. Canal Co.*, 34 Wis. 139; *Warren v. Hall*, 20 Colo. 508, 38 Pac. 767; *De Ford v. Hutchinson*, 45 Kan. 318, 11 L. R. A. 257, 25 Pac. 641; *Judah v. Trustees etc.*, 16 Ind. 56; *Bitting v. Thaxton*, 72 N. C. 541; *McHard v. Williams*, 8 S. D. 381, 59 Am. St. Rep. 766, 66 N. W. 931, and the cases cited above.)

It is quite true that some detached sentences in the earlier decisions of this court may be quoted contrary in effect to the conclusions above stated; but these utterances, occasioned by circumstances easily distinguishable from the present case and made *arguendo*, are no authority for affirming that in no instance can a counterclaim technically in tort arise out of the same transaction as the plaintiff's demand, when the latter is *ex contractu* in form. For instance: In *Wells v. Clarkson*, 2 Mont. 379, the court, distinguishing *Roberts v. Carter*, 38 N. Y. 107, said: "The facts in that case appear from the reported decision to have been that Carter brought an action against Roberts on a contract. Before judgment Carter assigned his claim to one Terry, and on the 23d day of July, 1857, a judgment was entered in favor of Terry in the action. Roberts, at the time of this assignment to Terry, was prosecuting an action against Carter for damages for fraud. The claim of Roberts was for unliquidated damages, at the date of this assignment by Carter to Terry, and hence Roberts at the date thereof had no right of setoff, equitable or otherwise, of a claim for unliquidated damages against a claim on contract, where the damages are liquidated. It was not until some time after this assignment that Robert's demand was merged in a judgment when it would have been the subject of a setoff. Terry then owned the claim, not Carter. Counsel ought to have been able to distinguish between that case and the one at bar." The pertinence of these remarks as applied to the facts stated is indubitable; but they have no value whatever as a precedent upon the question now in hand, because the claim of Roberts could not by any sort of reasoning have been held to arise out of the same transaction as Carter's demand, and as it did not arise out of the same or other contract and was not connected with the subject of Carter's action, it could not be a counterclaim.

In *Collier v. Ervin*, 3 Mont. 142, the word "transaction" was treated as though it meant the same as "contract," and upon the authority of *Wells v. Clarkson* it was categorically remarked that a "counterclaim founded upon a tort cannot be set off

against a claim founded upon contract." To appreciate the force of this *dictum* it is necessary to note the circumstances under which it was uttered, and these are, that the statute then in force (Codified Statutes 1871-72) authorized a counterclaim which consisted of "a cause of action arising out of the transaction set forth in the complaint," *etc.*, as distinguished from our present provision that a counterclaim may consist of "a cause of action arising out of the contract or transaction," *etc.* Whatever reason there might have been, under the statute and under the authorities as they then stood, for construing the term "transaction" as synonymous with "contract," can have no effect upon the clear implication of the present law that they are not synonymous.

Finally, in *Potter v. Lohse*, 31 Mont. 91, 97, 77 Pac. 419, the opinion quotes the above *dictum* of *Collier v. Ervin*. The quotation was unnecessary, if not irrelevant. The action was in conversion and it was sought to plead a judgment wholly unrelated to the foundation of plaintiff's claim and wholly unconnected with the subject of the action. It was properly held that this could not be done. This conclusion upon the facts was amply supported by the cases cited from New York; but the attitude of the New York courts upon the principles involved is illustrated by the authorities cited above.

According to the pleadings at bar, both parties ground themselves upon the relations created by the lease and bond, the execution of which was the beginning of the transaction between them. Then follow the entry into possession by the Waggoners; the occupancy of the premises by them, until the abandonment, as charged by the plaintiff, or until the eviction, as claimed by the defendants; the alleged default in the payment of rent; the re-entry by the plaintiff, including her seizure of the personal property of the Waggoners placed upon the premises under the authority of the lease; her refusal to surrender that property to them, and the divers other incidents and details which go to make up her right to sue and theirs to resist. Without taking each and all of these circumstances into account, the legal rela-

made upon the ground of dissatisfaction by the court with the conclusions of the jury in this regard.

Error is claimed to have occurred in the giving of instruction No. 13, and in the refusal of plaintiff's proposed instructions [9] numbered 4, 6 and 6½, sufficient to warrant a retrial, but we cannot assent to this. The instructions should be taken as a whole, and instruction No. 13, taken in connection with the others, is not open to the attack made against it, while the essentials of offered instructions 4, 6 and 6½ were fairly presented to the jury.

The order appealed from is affirmed and the appeal from the judgment is dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

HARRINGTON, ADMR., RESPONDENT, v. BUTTE MINER CO.
ET AL., APPELLANTS.

(No. 3,349.)

(Submitted February 7, 1914. Decided February 27, 1914.)

[139 Pac. 451.]

Libel—Instructions to Jury—Advisory Only—New Trial Order—Appeal.

New Trial Order—When Upheld on Appeal.

1. The rule that an order granting a new trial will be upheld if it can be justified upon any ground of the motion is applicable only where the order is a general one, not disclosing the particular ground upon which the court acted, or to a case where the provisions of section 7118, Revised Codes, are invoked.

Instructions—Jury Must Obey—Exception.

2. In all cases, except libel, the jury are bound by the instructions of the court; a verdict in disregard of them will be set aside as against law.

Libel—Instructions—Advisory Only.

3. In an action for libel, the court's instructions, to the extent of determining whether the publication complained of is or is not libelous, are advisory only and may be disregarded by the jury; hence a general

verdict in favor of defendant, contrary to the directions of the trial court, was not a ground for granting a new trial.

[As to province of judge and jury in libel cases, see note in 13 Am. St. Rep. 625.]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by T. J. Harrington, as administrator of the estate of James Kelly, deceased, against the Butte Miner Company and J. Lawrence Dobell. From an order granting a new trial plaintiff appeals. Reversed.

Messrs. George F. Shelton, Fred J. Furman, A. J. Verheyen, and M. P. Gilchrist, for Appellants, submitted a brief; Messrs. Furman and Gilchrist argued the cause orally.

Mr. D. M. Kelly, Mr. M. F. Canning and Mr. P. E. Geagan, for Respondent, submitted a brief; Mr. Canning argued the cause orally.

It may be conceded with relation to Missouri that the doctrine in that state on the law of libel is somewhat peculiar, the decisions holding that the only question to be decided by a jury in that state is the question of "libel or no libel," all other questions being matters of law for the court. It is further conceded that the rule in Missouri is well established that in all cases, as pointed out by this court in *Paxton v. Woodward*, the jury are not bound by the instructions of the court, while, of course, in Montana the rule is the reverse. The questions of ownership, malice, privilege, publication and damage are held to be questions of law for the court in cases of libel in the state of Missouri, and as to new trials it is here held: "Our conclusion, then, is that the provision of our constitution does not deprive the courts of their power to grant new trials in a libel suit on the ground that the verdict is excessive, or for any other recognized legal ground." (*Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S. W. 332.) And further, the court, notwithstanding the fact that it has held that the jury were the sole judges of the question

of libel or no libel, took upon itself to determine that question in several cases submitted to it. (*Diener v. Star-Chronicle Pub. Co.*, 230 Mo. 613, 132 S. W. 1143; *St. James' Military Academy v. Gaiser*, 125 Mo. 517, 46 Am. St. Rep. 502, 28 L. R. A. 667, 28 S. W. 851.) In support of their position counsel have also cited *Commercial Pub. Co. v. Smith*, 149 Fed. 704, 79 C. C. A. 410, and we fail to see how the ruling in that case helps appellants' position, for it was held that: "If its [the publication's] meaning is unambiguous, it is for the judge to say whether it is defamatory or not." As opposed to the isolated rule in Missouri, we find it laid down: "Where the language of a publication is unambiguous and clearly libelous and no evidence to change its natural meaning is introduced, it is the right and duty of the court to instruct the jury that it is defamatory." (*Pugh v. McCarty*, 44 Ga. 383; *Gabe v. McGinnis*, 68 Ind. 538; *Smith v. Stewart*, 41 Minn. 7, 42 N. W. 595; *Hunt v. Bennett*, 19 N. Y. 173; *Pittock v. O'Niell*, 63 Pa. 253, 3 Am. Rep. 544; *Gregory v. Atkins*, 42 Vt. 237; *Gottbehuet v. Hubachek*, 36 Wis. 515; *Arnold v. Ingram*, 151 Wis. 438, 138 N. W. 111; *Woolley v. Plaindealer Pub. Co.*, 47 Or. 619, 5 L. R. A. (n. s.) 498, 84 Pac. 473; *Moore v. Francis*, 121 N. Y. 199, 18 Am. St. Rep. 810, 8 L. R. A. 214, 23 N. E. 1127; *Childers v. San Jose Mercury*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 3 Ann. Cas. 546, 78 Pac. 215; *McArthur v. State*, 41 Tex. Cr. 635, 57 S. W. 848; *Houston Printing Co. v. Moulden*, 15 Tex. Civ. 574, 41 S. W. 381; 13 Ency. of Pl. & Pr. 105.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Action for damages for libel. Upon the trial of this cause, at the instance of the plaintiff, the court gave instruction No. 2 as follows: "You are instructed that the article complained of in this action is libelous in itself, and under the law and the evidence you should find for the plaintiff and against the defendants Butte Miner Company and J. Lawrence Dobell, and award

him such damages as in your judgment are just and fair under the circumstances." Notwithstanding this direction the jury returned a general verdict in favor of the company and Mr. Dobell. Plaintiff moved for a new trial upon three grounds: Insufficiency of the evidence, that the verdict is against law, and error in law occurring at the trial. The motion was sustained and a new trial granted in an order as follows: "This day, the motion of the plaintiff for a new trial herein is by the court granted, solely and entirely upon the single ground presented to this court that the jury disregarded and refused to obey the instruction of the court to find a verdict for the plaintiff." The appeal is from that order.

Counsel for respondent in their brief suggest that the order should be upheld if it can be done upon any ground of the [1] motion. That rule, however, applies only to a case where the order is a general one, not disclosing the particular ground upon which the court acted, or to a case where counsel have invoked the provisions of the Act for the compensation of errors (sec. 7118, Rev. Codes). In this instance counsel did not except to the order of the trial court which in effect overruled their motion upon every other ground save the one designated in the order. But assuming counsel's position to be correct, they do not indicate to us any error in the record claimed by them to be prejudicial to the plaintiff, other than the one upon which the trial court acted, and they cannot expect the members of this court to go through a record of more than 500 pages in a microscopic search for some error which they do not suggest exists there.

The one question before us is: Were the jurors bound by the trial court's instruction No. 2? In *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, this court held that in all cases, [2] *except libel*, the jury are bound by the instructions of the court, and a verdict in disregard of them will be set aside as against law. That decision has been affirmed repeatedly, and if in any given instance the exception noted above has been omitted in the statement of the rule, it was mere oversight. There

has never been any intention on the part of the court to modify the rule as there expressed; so that in the investigation of the question before us we are not embarrassed by any conflicting statements heretofore made by this court; indeed, the question has never been presented directly before this. In *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 3 Ann. Cas. 546, 78 Pac. 215, it was suggested but decision was reserved, as the question was not so directly involved that its determination was necessary to the proper disposition of the appeals in that case.

Section 10, Article III of the Constitution of Montana, contains this provision: "In all suits and prosecutions for libel, the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts." In its general scope it is not new to the law. Prior to 1792, the law of libel in England was in an unsatisfactory, if not uncertain, state, and for the purpose of setting at rest all questions as to the province of the jury in the trial of a libel case, the Parliament passed what is known as the Fox Libel Act, entitled "An Act to remove Doubts respecting the Functions of Juries in Cases of Libel" (32 Geo. III, Ch. 60). The Act was by its terms made applicable only to criminal libels. It provides that the trial court shall give the jury instructions as in other criminal cases, but that the jurors may determine for themselves the question of libel or no libel. The Act will be found in its entirety in *Odgers on Libel and Slander*, second edition, page 710.

In *Capital etc. Bank v. Henty*, L. R. 7 App. Cas. 741, the Judicial Committee of the Privy Council, considering the effect of the Fox Act upon the practice in England, said: "Since Fox's Act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libelous imputation. If the defendant can get either the court or the jury to be in his favor, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the court and the jury to decide for him."

In *Odgers on Libel and Slander*, second edition, page 604, the proceeding in the trial of a criminal libel after the enactment

of the Fox Act is tersely stated as follows: "The judge, of course, may still direct the jury on any point of law, stating his own opinion thereon, if he thinks fit; but the question of libel or no libel must ultimately be decided by the jury."

Commenting upon the practice in England before the passage of the Fox Act, under which the courts reserved to themselves the right to determine the question of libel or no libel, Judge Cooley in his Principles of Constitutional Law, 281, says: "This doctrine was overruled by statute in England, and the jury are now permitted to judge of the whole case, and to decide, not merely upon the responsibility of the publication, but upon the animus with which it was made, and whether within the rules of law the publication is libelous. The instructions of the judge upon the law become under this rule advisory merely, and the jury may disregard them if their judgment is not convinced."

That these authorities correctly interpret the statutory law of libel in England would seem to be beyond controversy.

Early in the history of this country, like provisions, applicable only to criminal prosecutions for libel, were enacted. Most of them have found expression in state Constitutions. For instance, in Alabama the Constitution (Art. I, sec. 13) provides "that in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the court"; and a like provision is found in Arkansas, California, Connecticut, Delaware, Kentucky, Maine, Michigan, Mississippi, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas and Wisconsin, and in the statute law of Iowa and Kansas. In every instance, however, it is limited to criminal libels.

Upon the question before us it is idle to cite cases from states which have no provision of Constitution or law respecting the functions of a jury in the trial of a libel case. In the absence of any such provision, the general rule that the court's instructions are binding upon the jury would prevail (*Gregory v. Atkins*, 42 Vt. 237); and this would be the rule also in the trial

of civil cases for libel in the states enumerated above, where the provision is limited to criminal libels. But a decision from any one of those states in a criminal prosecution is a precedent and valuable, to the extent that the reasoning of the court appeals to us and indicates the general view as to the purpose of a provision of this character.

The Constitution of California provides: "In all criminal prosecutions for libels * * * the jury shall have the right to determine the law and the fact." In *People v. Seeley*, 139 Cal. 118, 72 Pac. 834, the court said: "The provision in the Constitution is contained in nearly all the state Constitutions. The occasion for such provision was that in the early rulings of the courts the jury were required to confine their attention to the facts, and the court determined conclusively the libelous or innocent character of the publication. This doctrine was long ago overruled in England, and the jury are now permitted to judge of the whole case, and to decide not only as to the fact of publication, but upon the animus with which it was made, and whether, within the rules of law, the publication is libelous. The judge has the right to instruct the jury, but his instructions are advisory only. The jury could disregard the instructions, and bring in a verdict even contrary to the evidence. They are the sole judges of the law as well as of the fact."

In *State v. Heacock*, 106 Iowa, 191, 76 N. W. 654, after referring to the section of the Iowa Code conferring upon juries in criminal libel cases the power to determine the law as well as the facts; it is said: "But the legal right of a jury, in a criminal prosecution under the sections quoted, to determine the law which should govern the verdict, even though a decision in conflict with the charge of the court be reached, cannot be doubted. The sections gave to the jury in such cases not merely the power, but the right, to make such a decision, and the jury was not required to follow the charge of the court, which must be regarded as advisory, and not conclusive as to the duty of the jury."

In Pennsylvania the constitutional provision applicable to criminal libels reads: "In all indictments for libels the jury

shall have the right to determine the law and the facts, under the direction of the court, as in other cases." In *Pittock v. O'Niell*, 63 Pa. 253, 3 Am. Rep. 544, the court, after quoting the provision above, said: "There can be no doubt that both in criminal and civil cases the court may express to the jury their opinion as to whether the publication is libelous. The difference is, that in criminal cases they are not bound to do so, and if they do, their opinion is not binding on the jury, who may give a general verdict in opposition to it, and if that verdict is for the defendant, a new trial cannot be granted against his consent. As our declaration of rights succinctly expresses it, the jury have the right to determine the law and the facts in indictments for libel as in other cases."

In Kansas it is provided by statute that in all indictments or prosecutions for libel the jury shall have the right to determine the law and the facts; and in *State v. Verry*, 36 Kan. 416, 13 Pac. 838, it is said: "Of course, the court is not to abdicate its power and duty of instructing the jury upon the law of the case. The charge should be as full and complete as in cases where the jury are to implicitly take and follow the law laid down by the court. By reason of the learning and experience of the judge who presides, as well as the authority with which he is invested, the jury will doubtless heed and highly regard his opinion, as they should do, and will incline to adopt it rather than a contrary view presented by counsel; but the instructions which he gives are only advisory, and the jury are not in duty bound to accept and follow his views."

The foregoing are in harmony with the English cases and indicate very clearly the purpose of the rule and the power intended to be conferred by it upon juries, in criminal prosecutions for libel. In the Constitution of each of the following states, Colorado, Missouri, South Dakota and Wyoming, is a provision similar to that quoted above from our own Constitution, which applies to all libel cases, civil as well as criminal. In *Ross v. Ward*, 14 S. D. 240, 86 Am. St. Rep. 746, 85 N. W. 182, the trial court had directed a verdict for plaintiff, leaving to the jury

only the question of the amount of damages. After referring to the authority conferred upon the jury in the trial of a libel case, either civil or criminal, the court said: "The fact that the jury shall have the right to determine the fact and the law under the direction of the court seems to have been overlooked by the learned circuit court. The court, it is true, may direct the jury by stating to them what constitutes a privileged communication as laid down in the law, but whether or not the communication is privileged is a matter to be determined by the jury. The provision of the South Dakota Constitution is self-executing. To the lawyer familiar with the early decisions of the English courts upon the subject of libel and slander, the importance of this provision will be apparent. In our view of the case, therefore, the court has no right to take from the jury the question of whether or not the communication in this case was privileged."

Under a constitutional provision identical with our own, the Missouri courts have held consistently that the question of libel or no libel is for the jury; that it is the province of the trial court to advise the jury, but that the jury are not bound by the instructions so far as the question of libel or no libel is concerned, and that a general verdict for a defendant concludes the case. (*Duncan v. Williams*, 107 Mo. App. 539, 81 S. W. 1175; *Sands v. Marquardt*, 113 Mo. App. 490, 87 S. W. 1011; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614; *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, 54 S. W. 457; *Ukman v. Daily Record Co.*, 189 Mo. 378, 88 S. W. 60.)

The question has not been before the supreme court of Colorado directly, so far as our investigation discloses. In *Hazy v. Woitke*, 23 Colo. 556, 48 Pac. 1048, an order of the trial court granting a nonsuit was reversed and some observations, by way of *dictum*, upon the power of the court in libel cases, are made, but nothing is said which is out of harmony with the declarations of any of the courts referred to above.

The question does not appear to have been considered by the Wyoming court; and we have not found any authority contrary to the views expressed above from any state having a constitu-

tional or statutory provision conferring upon juries in libel cases the power to determine the law as well as the facts. The authorities cited are entitled to respectful consideration from us. But even if there were not any authorities upon the subject, we would be compelled to the same conclusion as they express; for any other decision of the question would render the language of our Constitution meaningless. It was unnecessary for the framers of our Constitution to make any declaration upon the subject at all, if it was intended that the court's instructions as to the libelous character of a publication should be binding upon the jury, for that would be the rule in the absence of any declaration.

[3] The history of these peculiar provisions, which make the trial of a libel case *sui generis*, discloses beyond all controversy that the purpose of their enactment has always been to confer upon juries a power not otherwise available to them, and that to the extent of determining whether a particular publication is or is not libelous, the court's instructions shall be advisory only and may be disregarded by the jury. Except as to the question of libel or no libel, the authority of the trial court has not been curtailed and in every other respect the trial of a libel case proceeds as any other.

It follows that the jury in this instance were not bound by instruction No. 2; that a decision contrary to that instruction is not a decision contrary to law, but under the Constitution is very clearly a verdict according to law as determined by the jury. The refusal of the jury to follow the advice of the court in this instance was not a ground for granting a new trial. In the absence of any prejudicial errors occurring at the trial, the general verdict in favor of defendants should have concluded this case.

The order granting a new trial is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

CANNING, RESPONDENT, v. FRIED, APPELLANT.

(No. 3,362.)

(Submitted February 5, 1914. Decided February 27, 1914.)

[139 Pac. 448.]

Bills of Exceptions—Time for Presenting—Statutes—Default—Setting Aside—Showing Necessary—Practice—New Trial Order—Appeal—Special Order After Final Judgment.

Bills of Exceptions—Time for Settlement—Unlawful Extension of Time.

1. Under section 7190, Revised Codes, the time for presenting a bill of exceptions for settlement may not be extended for a period of time exceeding ninety days without the consent of the adverse party; hence objection to the settlement of a bill on the ground that it came too late should have been sustained, where an extension of time in excess of that above mentioned was granted without the adversary's consent.

Same—Default—Relief from—Showing Required.

2. Ignorance of the law as declared in section 7190, referred to in paragraph 1, *supra*, does not constitute an excuse within the meaning of section 6589, Revised Codes, authorizing the district court to relieve a party of his default upon a showing of mistake, inadvertence, excusable neglect, etc.—assuming the latter section to be applicable to the default of a party in failing to present his bill of exceptions in time for settlement.

Same—Discretion—Must be Put in Motion.

3. The rule that if, upon a motion to set aside a default, the showing made leaves the court in doubt, it should be resolved in favor of the motion, presupposes that a proper showing has been made; in the absence of a showing, the court's discretion is not set in motion.

Same—Untimely Presentation—Practice.

4. Where a bill of exceptions is presented too late for settlement, it should be settled, after incorporation of the adverse party's objections, and the motion for new trial denied, or the court may refuse to settle the bill because presented too late.

Appeal—Correct Ruling—Wrong Reason.

5. A correct ruling of the district court, though based upon a wrong reason, will be upheld on appeal.

New Trial Order—Notice of Intention—Record on Appeal.

6. In the absence from the record of a copy of the notice of intention to move for a new trial, the supreme court may not pass upon the merits of the motion.

Special Order After Final Judgment—Appealable Order—Review.

7. An order refusing to set aside a judgment is a special one made after final judgment and appealable as such (Rev. Codes, sec. 7098); hence may not be reviewed on appeal from a new trial order.

*Appeal from District Court, Silver Bow County; J. B. Poin-
dexter, a Judge of the Fifth Judicial District, presiding.*

ACTION by Matthew T. Canning against Max Fried. Judgment for plaintiff. Appeal by defendant from an order denying a new trial. Affirmed.

Mr. Peter Breen, for Appellant, submitted a brief; *Mr. Henry C. Smith*, of Counsel, argued the cause orally.

Mr. William Meyer, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 26, 1912, a judgment upon a verdict was entered in favor of the plaintiff and against the defendant, in an action for damages for malicious prosecution. Some time thereafter—the record does not disclose when—defendant was granted sixty days, in addition to the time allowed by law, within which to prepare a bill of exceptions in support of his motion for a new trial. On April 26 another like order was made, and on July 1 a third extension of sixty days' additional time was granted by the trial court. All of these orders extending the time were made without the consent of the adverse party. The bill of exceptions was finally served on August 30, 1912. Plaintiff immediately presented written objections to its settlement on the ground that it had not been presented in time. Defendant then moved the court to relieve him from his default in failing to present the proposed bill within seasonable time, upon the grounds of mistake, inadvertence, surprise and excusable neglect, and supported the motion by an affidavit of Mr. T. T. Lyon, his former attorney. On December 19, 1912, the court granted this motion on condition that plaintiff's objections and these other subsequent proceedings be incorporated in the bill, and further time was granted for the presentation and settlement. The suggested amendments were made, the bill of exceptions settled on February 13, 1913, and the motion for a new trial denied on March 8, 1913.

Section 6788, Revised Codes, requires that a bill of exceptions shall be presented for settlement within ten days after the entry of the judgment upon a verdict, or within such further time as the court or judge may allow. Section 7190, Revised Codes, [1] provides that the court or judge cannot extend the time for presenting a bill of exceptions more than ninety days without the consent of the adverse party; so that the order made on July 1, 1912, granting defendant further time was a nullity, and the bill of exceptions presented on August 30, came too late and plaintiff's objection to it upon that ground, was well taken.

Without determining whether the provisions of section 6589, Revised Codes, have any application to the predicament in which [2, 3] a party finds himself when he has not presented his bill of exceptions in time, but assuming that he is then in default and may invoke the rule of that section for relief, still the authority conferred can be exercised only when the discretion of the court is set in motion by an application supported by a showing of mistake, inadvertence, surprise or excusable neglect. If defendant can claim any benefit under that section, it is only by complying with its requirements. The affidavit of Mr. Lyon upon which defendant relied and the trial court acted is barren of any facts which tend to excuse the delay. It is asserted in the affidavit that the bill of exceptions could not be prepared without a transcript of the stenographer's notes of the testimony taken at the trial; that the affiant made repeated requests of the stenographer for such a transcript; that the stenographer informed him it could not be delivered until the latter part of June and in fact was not secured until June 25. There is not presented any affidavit by the stenographer, and Mr. Lyon is altogether silent as to when the demands upon the stenographer were made or whether he tendered the legal fees. For all that he says, he may not have requested the transcript until June. There is not a word in explanation of the stenographer's delay. Nothing is disclosed as to whether Mr. Lyon applied to the district court for an order compelling the stenographer to deliver the transcript at an earlier date. All that we have from the

stenographer is conveyed by a hearsay declaration, which under these circumstances is not entitled to any evidentiary value. Mr. Lyon is frank enough to say in his affidavit: "That the deponent was not aware of the time * * * of such limitation upon the court's power to grant such extension of time and therefore did not procure the consent of counsel of plaintiff to such order." But a mistake as to the law is not the mistake contemplated by section 6589 above, and ignorance of the law does not constitute an excuse within the meaning of that statute. (*Willoburn Ranch Co. v. Yegen*, 45 Mont. 254, 122 Pac. 915; *Donlan v. Thompson Falls C. & M. Co.*, 42 Mont. 257, 112 Pac. 445; *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591.)

It is the rule in this state that if upon a motion to set aside a default the showing made leaves in the mind of the court a doubt as to whether it should be granted, that doubt is to be resolved in favor of the motion (*Greene v. Montana Brewing Co.*, 32 Mont. 102, 79 Pac. 693), but the rule presupposes that a proper showing under the statute has been made, and in many instances where defaults have been set aside without such showing, the orders have been reversed. (*Lovell v. Willis*, 46 Mont. 581, 129 Pac. 1052; *Scilley v. Babcock*, 39 Mont. 536, 104 Pac. 677; *Chambers v. City of Butte*, 16 Mont. 90, 40 Pac. 71; *Thomas v. Chambers*, 14 Mont. 423, 36 Pac. 814.)

The very purpose of section 7190 in fixing a limit upon the period of time which the court may grant for the presentation of a bill of exceptions is to compel diligence by the moving party and to prevent unreasonable delays such as occurred in this instance, which have been the cause of much animadversion upon the administration of our law. Mr. Lyon's affidavit is eloquent with silence as to any facts showing diligence on his part or any excuse for the delay of more than five months in presenting the [4] bill of exceptions for settlement. After plaintiff's objections were incorporated, the bill should have been settled and the motion for a new trial denied upon the ground that the bill was not presented in time and therefore could not be considered. This would have conformed to the practice indicated in *Sweeney*

v. *Great Falls & C. Ry. Co.*, 11 Mont. 34, 27 Pac. 347. and approved in *Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124. and in *Vreeland v. Edens*, 35 Mont. 413, 89 Pac. 735; or the court might have refused to settle the bill because presented too late. (*Wright v. Mathews*, 28 Mont. 442, 72 Pac. 820; *Beach v. Spokane Ranch & W. Co.*, 25 Mont. 367, 65 Pac. 106.) But if the [5] trial court's ruling upon the motion was right, it will be approved even though it was prompted by a wrong reason. (*Brown v. Daly*, 33 Mont. 523, 84 Pac. 883; *Butte v. Goodwin*, 47 Mont. 155, 134 Pac. 670; *Marron v. Great Northern Ry. Co.*, 46 Mont. 593, 129 Pac. 1055.) The ruling can be justified upon the ground that the bill of exceptions was not presented in time, and no valid excuse being offered for the delay, it could not be considered.

Counsel for appellant invoke the rule repeatedly announced by this court, that every matter should be considered upon its [6] merits, if possible; but counsel overlook the fact that it is absolutely impossible in this case to determine appellant's motion for a new trial upon the merits, even if we had before us a bill of exceptions presented in time. Our Code prescribes the grounds upon which a new trial may be granted (section 6794, Rev. Codes), and it cannot be granted upon any other. (*Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920.) The grounds of a motion can be disclosed only by the notice of intention which is required to be filed within ten days after receipt of notice of the entry of judgment. (Section 6796.) This record is silent as to whether a notice of intention was ever filed. To the end that this court may review an order granting or refusing a new trial, it must be apprised of the grounds of the motion, and section 7114 requires that the appellant shall furnish this court with a duly authenticated record containing a copy of the notice of intention. The appellant in this instance has failed to comply with that requirement. The record before us does not contain any copy of the notice of intention, nor does it mention such a paper, and in its absence it is impossible for us to know whether there was any merit in appellant's motion.

On September 24, 1912, defendant moved the trial court to [7] set aside the judgment entered in this cause, on the ground that the judge who presided at the trial had no authority to do so. The motion was overruled and we are now asked to review that order upon this appeal. The order was a special one made after final judgment and as such is made appealable by section 7098, Revised Codes. The proceeding upon that motion is no part of the new trial proceeding, and in the absence of a separate appeal, the ruling upon that motion is not before us for review.

The order refusing a new trial is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

MANHATTAN CO., APPELLANT, v. WHITE, RESPONDENT.

(No. 3,350.)

(Submitted February 9, 1914. Decided February 28, 1914.)

[140 Pac. 90.]

Tenants in Common—Ditches—Cost of Maintenance—Actions—Complaint—Insufficiency.

1. One tenant in common may not charge the other with expense of repair or improvement of the common property, except when incurred with the latter's consent or, in case of necessity, upon prior notice and demand met with refusal to co-operate; hence the complaint in an action by a ditch owner to recover from his co-owner the latter's proportionate share of the cost of repair and maintenance of the ditch, *held* not to state a cause of action in the absence of allegation of any of the matters referred to above.

[As to law of betterments, see note in 81 Am. St. Rep. 164.]

Appeal from District Court, Gallatin County; J. M. Clements, Judge of the First Judicial District, presiding.

ACTION by the Manhattan Company, a corporation, against J. F. White. Plaintiff appeals from the judgment and from an order overruling its motion for new trial. Order affirmed; judgment reversed with directions.

Messrs. Hartman & Hartman, for Appellant, submitted a brief; *Mr. Walter Hartman* argued the cause orally.

Mr. John A. Luce, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The complaint alleges: That the plaintiff is the owner of 1305/1500 of what is known as the Moreland canal and water right in Gallatin county, Montana; that the defendant is the owner of 83/1500 of the same; that the defendant became such owner by virtue of a deed executed and delivered to him by the plaintiff on May 23, 1905, which deed, after describing certain real estate thereby conveyed, contains the following language: "Including with said land the following interest in and to the canal known as the Moreland canal, to wit: 83/1500 interest. The party of the second part to assume his proportionate amount of the cost of maintaining said canal"; that said deed was delivered and accepted by the defendant in consummation of a certain written contract entered into by the plaintiff and the defendant on May 23, 1905, which contract contained the following provision: "Said White further agrees to stand 83/1500 of cost of maintenance of said Moreland ditch"; that between May 23, 1905, and December 31, 1909, "plaintiff did and performed all the work and labor and furnished all the money expended in and about the maintenance of said canal during said time, and in full completion of said work of maintenance, said work and labor done and money expended amounting in the aggregate to the sum of \$5,458.04, and that the share thereof due from defendant to plaintiff pursuant to the covenants and agreements of defendant contained in said deed and contract as aforesaid, amounts to \$302.12 (or 83/1500 of said sum of \$5,458.04), no part of which has been paid, though defendant has often been requested to pay the same by plaintiff."

A general demurrer to this complaint was overruled, and after answer by the defendant and trial to the court without a jury,

the plaintiff was adjudged to have and recover the sum of \$72.80. The plaintiff, deeming that judgment inadequate, appeals therefrom, as well as from an order overruling its motion for new trial.

Certain contentions are presented in support of the appeals, grounded upon an alleged misconstruction by the trial court of the provisions of the contract and deed above quoted; but these we cannot consider, for the reason that the respondent, invoking the provisions of section 7118, Revised Codes, insists—and quite [1] correctly—that the complaint does not state facts sufficient to support any judgment. Under the facts stated by the complaint, the parties stand in the position of tenants in common. This circumstance is recognized and argued by the appellant itself. Such being their situation, neither was the agent of the other; neither could charge the other with any expense incurred in the repair or improvement of the common property, except by consent, or, in case of necessity, upon prior notice to the other with demand and refusal to co-operate therein. (Freeman on Cotenancy, *etc.*, secs. 182–185, 261, 262; 38 Cyc. 50; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911, and note, 29 L. R. A. 449, 21 S. E. 746; *Cooper v. Brown*, 143 Iowa, 482, 136 Am. St. Rep. 768, 122 N. W. 144; note to *Robinson v. McDonald*, 62 Am. Dec. 482; *Stickley v. Mulrooney*, 36 Colo. 242, 118 Am. St. Rep. 107, 87 Pac. 547; *Mumford v. Brown*, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; *Kidder v. Rixford*, 16 Vt. 169, 42 Am. Dec. 504; *Calvert v. Aldrich*, 99 Mass. 74, 96 Am. Dec. 693; *Welland v. Williams*, 21 Nev. 230, 29 Pac. 403; *Stevens v. Thompson*, 17 N. H. 103; *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582.)

It was therefore necessary for the appellant to allege and prove consent or ratification; or, failing that, necessity with a prior notice, demand and refusal. The complaint does not contain any such allegations, and the deficiency was not supplied by pleading the deed, because the stipulation above quoted—which is the only one at all pertinent—merely fixes the measure of respondent's general duty and cannot be construed as referring to the particular work or expenditure in question, nor as an

admission of its necessity, nor as an authorization of appellant to do it either then or at any particular time. It was not found by the court that there had been consent, notice, demand or refusal. To sustain any judgment we should be required to deem the complaint amended and to imply essential findings; but the complaint cannot be deemed amended because the bill of exceptions does not present any evidence or disclose that any of these facts was established by evidence received without objection: and we cannot imply findings of fact without either pleadings or proof.

As the case is presented, the duty of the court is to make disposition of it according to the substantial rights of the parties as shown upon the record. (Rev. Codes, sec. 7118.) The order appealed from is therefore affirmed, but the judgment is reversed at the cost of appellant, and with directions to the district court of Gallatin county to vacate its order overruling the demurrer to the complaint and to enter an order sustaining the same.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied April 22, 1914.

DE CELLES, RESPONDENT, v. CASEY, APPELLANT.

(No. 3,353.)

(Submitted February 7, 1914. Decided February 28, 1914.)

[139 Pac. 586.]

Conversion—Punitive Damages—Evidence—Insufficiency—Return of Part of Property—Instructions—Jury—Passion and Prejudice—New Trial—Pleadings—Amendments—Discretion—Appeal and Error.

Pleading and Practice—Amendments—Discretion—Appeal.

1. Error in overruling a general demurrer to the complaint in an action for conversion, which the court, over objection, permitted to be amended after the close of the evidence, was not available to appellant, since the pleading as amended took the place of the complaint as it stood at the beginning of the trial, and the integrity of

the judgment is determinable upon the amended and not upon the original pleading.

Same.

2. In the absence of a showing of abuse of discretion, the action of the court in permitting a complaint in conversion to be amended after the close of the evidence so as to render definite and certain the allegation that at the time of the taking of the property, the plaintiff was entitled to its immediate possession, will be approved on appeal.

Conversion—Principal and Agent.

3. Assumption of dominion over personal property of another, inconsistent with the latter's ownership of it, by a corporation through one of its agents amounts to a technical conversion of it by the agent as well the company, if the former was acting within the scope of his employment.

[As to what constitutes conversion of personal property, see notes in 15 Am. Dec. 151; 24 Am. St. Rep. 795.]

Same—Punitive Damages—Evidence—Insufficiency.

4. Evidence *held* insufficient to justify an inference of malice, fraud or oppression in either taking or detaining property in controversy in an action in conversion; hence the imposition of punitive damages, otherwise recoverable under section 6047, Revised Codes, was unwarranted.

[As to measure of damages in action of trover, see note in 24 Am. Dec. 70; 54 Am. Rep. 421.]

Same.

5. Where two employees of a storage company were guilty of conversion in the first instance, the fact that one refused to divulge information in his possession of the other's appropriation of the articles to his own use was not sufficient ground for the exaction of punitive damages from him.

Same—Excessive Verdict—New Trial.

6. Where a verdict is wholly out of proportion to the wrong done and the cause of it and cannot be accounted for on any other theory than that it was measured by the passion and prejudice of the jury, a new trial should be granted.

Same—Excessive Verdict—Jury—Passion and Prejudice.

7. *Held*, under the above rule that a verdict for \$1,050 in favor of plaintiff in an action in conversion, \$50 of which was for the value of the articles in controversy, and the balance for punitive damages, was so excessive as to warrant a new trial, even after reduction of one-half of the award ordered by the court and accepted by the plaintiff.

Same—Return of Part of Property—Instructions.

8. Where a part of the articles in dispute in an action in conversion was returned to the plaintiff, an instruction that in arriving at a verdict the jury should consider the return thereof in mitigation of damages was proper, while one which permitted a finding for the full value of the goods returned was improper.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Minnie J. De Celles against James S. Casey and Frank A. Shoemaker. From a judgment in favor of plaintiff

and from an order denying a new trial, defendant Casey appeals. Reversed and remanded.

Cause submitted on brief of appellant.

Messrs. Frank & Cary, for Appellant.

Where, after the taking of goods from his possession, the owner still claims them as his own and institutes proceedings to recover the actual goods as distinctive from their value, the conversion is waived and no subsequent action by the injured party will lie to recover the value of the goods so taken by the wrongdoer. (*Enos v. Cole*, 53 Wis. 235, 10 N. W. 377; *Stout v. Fultz*, 117 Mo. App. 573, 93 S. W. 919; *Collins v. Lowry*, 78 Wis. 329, 47 N. W. 612; *Weakley v. Evans* (Tenn.), 46 S. W. 1070.) Where the property, which is the subject of an action for conversion, is in bailment at the time of the alleged conversion, that fact of itself is sufficient to defeat the action of trover and conversion. (3 Am. & Eng. Ency. of Law, 763; 5 Cyc. 221; *Triscony v. Orr*, 49 Cal. 612.)

A mere intent to do an unlawful act is not sufficient to constitute malice or to warrant exemplary damages. (See 12 Am. & Eng. Ency. of Law, 24; *Badostain v. Grazide*, 115 Cal. 425, 47 Pac. 118; *Inman v. Ball*, 65 Iowa, 543, 22 N. W. 666; *Brown v. Allen*, 35 Iowa, 306; *Remington v. Kirby*, 120 N. C. 320, 26 S. E. 917.) The only possible wrongdoing of which appellant was guilty was that instead of telling the plaintiff's agents that he knew where some of her property was, he stated that he knew nothing about it. The law in reference to exemplary damages is that they must bear some reasonable relation in size to the actual damages, and the courts have, with great uniformity, cut down exemplary damages where they were so disproportionate as in the case at bar. (*Texas Land & Cattle Co. v. Nations* (Tex. Civ.), 63 S. W. 915; *Saunders v. Mullen*, 66 Iowa, 728, 24 N. W. 529; *Flanary v. Wood*, 32 Tex. Civ. 250, 73 S. W. 1072; *McCarthy v. Niskern*, 22 Minn. 90; *International & G. N. R. Co. v. Telephone & Tel. Co.*, 69 Tex. 277, 5 Am. St. Rep. 45, 5

S. W. 517; *Buford v. Hopewell*, 140 Ky. 666, 131 S. W. 502; *Winterscheid v. Reichle*, 45 Mont. 238, 122 Pac. 740.)

May the court in passing on a motion for new trial consider the excessiveness of damages where the notice of intention to move for new trial does not specify "excessive damages resulting from passion or prejudice"? And may it grant a new trial or reduce the amount of the judgment in the absence of such specification in the notice of intention? Under section 657, California Code of Civil Procedure (our section 6794, Rev. Codes), the supreme court of that state has held that between the grounds of "excessive damages resulting from passion and prejudice" and "insufficiency of evidence to justify the verdict," there was substantially no difference. (*Du Brutz v. Jessup*, 54 Cal. 118; *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 57 Pac. 774; *Graybill v. De Young*, 140 Cal. 323, 73 Pac. 1067; *Swett v. Gray*, 141 Cal. 63, 74 Pac. 439.)

No appearance on behalf of Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover of the defendants Casey and Frank A. Shoemaker, damages for the conversion of certain personal property of plaintiff, consisting of a set of Werner's edition of the Encyclopedia Britannica and miscellaneous books, sheet music, and articles which may be classed as domestic utensils. The prayer was for a judgment for \$500 compensatory and \$1,000 punitive damages. The defendants filed separate answers in which they denied generally all the allegations of the complaint. They also alleged affirmatively certain matters as special defenses by way of justification or in abatement, upon which the plaintiff joined issue by reply. At the trial the issues in this behalf were eliminated from the case, the defendants relying exclusively upon the issues tendered by the denials. The jury returned a verdict in favor of the plaintiff for \$1,050, of which, as is disclosed by a special finding returned with the

verdict by direction of the court, the sum of \$50 was for the value of the property converted and \$1,000 for punitive damages. Judgment was entered accordingly. The defendants moved for a new trial. The court made an order granting their motion unless within thirty days the plaintiff would file with the clerk her consent in writing that the amount of the judgment be reduced by deducting from it, as of the date of its rendition, the sum of \$500. The written consent was thereafter filed and the judgment was amended accordingly. A new trial was then refused. The defendant Casey has appealed from the order and the judgment as amended. Counsel for plaintiff has not filed a brief. We are thus left to determine the appeals as best we may upon the contentions made by counsel for defendant Casey.

The first contention is that the complaint does not state a cause of action for a conversion. The sufficiency of it was questioned [1] by general demurrer, which the court overruled. At the close of the evidence and at the suggestion of the court, the pleading was amended by striking out one paragraph and amending another so as to render definite and certain the allegation that at the time of the taking of the property in question the plaintiff was entitled to the immediate possession of it. The defendants objected to the amendment at that time, on the ground that it made the complaint sufficient, whereas prior to the amendment it was wholly insufficient and therefore the court could not lawfully permit or direct the amendment. They did not thereafter question the sufficiency of the pleading in any way. Counsel now contends that the court erred in overruling the demurrer. This contention is without merit. The pleading as amended took the place of the pleading as it stood at the beginning of the trial. (*Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303; *Bordeaux v. Bordeaux*, 43 Mont. 102, 115 Pac. 25.) If, therefore, it be conceded that the original pleading was open to attack by general demurrer, for present purposes the integrity of the judgment must be determined upon the pleading as amended, and not upon the original pleading. The error, if such there was, in overruling the demurrer cannot now avail the defendant.

But counsel insist that the complaint as amended is insufficient, in that it fails to allege in terms that the defendants converted the property. While the complaint is not a model and would have been open to an objection by special demurrer on the ground of uncertainty, it is sufficient to withstand an objection to it on the ground of insufficiency, made for the first time in this court.

Counsel contend also that the court had no power to permit or direct an amendment, at that stage of the trial. Wherein the defendants suffered prejudice by reason of it, however, is not pointed out; nor is prejudice disclosed by the record. The [2] power to allow or disallow amendments at any stage of the trial is within the discretion of the court. (Rev. Codes, sec. 6589.) If no abuse is shown, the court's action will be approved on appeal. (*Sandeen v. Russell Lumber Co.*, 45 Mont. 273, 122 Pac. 913; *Dorais v. Doll*, 33 Mont. 314, 83 Pac. 884.) This discretionary power authorizes a court in proper cases, even on its own motion, to direct an amendment if in its opinion a nonsuit or mistrial may be avoided.

It is further contended that the evidence is wholly insufficient to justify the verdict in any amount, as against Casey, or, in any event, that it does not justify a finding of punitive damages. The facts out of which this controversy grew are briefly the following: In August, 1910, the plaintiff and her husband were occupying a house in Butte which they had rented fully furnished. The husband, having closed up his business, went to Great Falls to seek employment, expecting the plaintiff to follow him. Before leaving he packed into a barrel and three boxes the glassware belonging to the plaintiff, and other similar articles usually found in a household, together with a set of the *Encyclopedia Britannica*, and a number of miscellaneous books, sheet music, *etc.* These latter articles were packed in one of the boxes. The barrel and boxes were marked plainly as the property of the plaintiff and stored at the warehouse of one Dorais, who kept a grocery store in Butte. Dorais kept the packages gratuitously and merely as an accommodation. Presently the

plaintiff also went to Great Falls leaving the packages stored. Some time later Dorais' grocery business went into the hands of the Credit Men's Association of Butte to be wound up for the benefit of its creditors. The association at first attempted to continue sales by retail but finally concluded to sell out the stock by wholesale. This was done in or about October 12, 1911. The defendants Casey and Shoemaker were employees of the Butte Grocery Company. This company purchased a part of the Dorais stock and had it carted from the Dorais warehouse to its own warehouse. Both Casey and Shoemaker knew about the packages belonging to the plaintiff. While the purchases of the Butte Grocery Company were being carted to its warehouse under the direction of Casey and Shoemaker, Casey directed the drayman to bring plaintiff's packages to the company's warehouse. This order was countermanded by Shoemaker and for the time the packages were left at Dorais' place. On a later day the box of books and one of the other boxes was brought to the warehouse with other goods. By whose order this was done does not appear. Casey, who was at the time receiving the goods as they were brought to the warehouse of the Butte Grocery Company, ordered one of the helpers to take the packages up to the second story of the warehouse and store them. What the contents of the second box were, the evidence does not disclose; nor does it disclose their value, nor what became of the barrel and the other boxes. In December Mr. De Celles returned from Great Falls to look after the property but could not find any of the packages in the Dorais warehouse or that of the Butte Grocery Company. He was told by both Casey and Shoemaker that they knew nothing about them. Later on, about February 10, 1911, Mr. De Celles, in company with a constable armed with a search-warrant, went to the home of Shoemaker and there found the set of Encyclopedia Britannica and a lot of glassware which he identified as belonging to the plaintiff. He did not find the miscellaneous books and sheet music, nor any other of the articles. They were not found anywhere. Mr. De Celles took away the books, but left the glassware where he found it. About a

week or ten days after the boxes were taken to the grocery company's warehouse, in a conversation between Casey and Shoemaker overheard by one of the witnesses who was then in the employ of the grocery company, the statement was made that De Celles was indebted to the company about \$35, that the books would bring about \$50, and that they (presumably the company) would get more money than the bill amounted to. The witness could not tell who made the statement. Prior to this time someone had opened the box containing the books and the witness had learned what its contents were. This is a summary of all the evidence, except that introduced on the subject of value.

It will be noted that direct personal responsibility for the bringing of the two boxes to the company's warehouse is not fixed upon anyone. Casey's direction to the drayman was countermanded by Shoemaker and was not obeyed. Since a part of the property in them was thereafter found in Shoemaker's possession, it is a fair inference that he was responsible. Casey's only connection with the matter was his direction to the helper to store the boxes in the warehouse. The possession thus acquired [3] was that of the company and not his, and though, since dominion over the property inconsistent with the ownership of it by the plaintiff, was thus assumed by the company through his instrumentality, this amounted to a technical conversion of it by him and also the company, if he was acting within the scope of his employment (2 Cooley on Torts, 3d ed., 859 *et seq.*; *Tuttle v. Hardenberg*, 15 Mont. 219, 38 Pac. 1070); and though [4] the statute authorizes the imposition of punitive damages in cases of this character if the defendant has acted maliciously, fraudulently or oppressively either in taking or detaining the property in controversy (Rev. Codes, sec. 6047; *Bohm v. Dunphy*, 1 Mont. 333; *Shandy v. McDonald*, 38 Mont. 393, 100 Pac. 203; 1 Sedgwick on Damages, secs. 373, 374), there is nothing in the evidence justifying an inference of malice, fraud or oppression in anything Casey did. Apart from the fact that he ordered the boxes stored after they reached the warehouse, there is nothing to connect him with the taking or the subsequent de-

tion. It is true that he stated to Mr. De Celles and the plaintiff that he did not know anything as to the whereabouts of the boxes at the time the inquiry was made of him. So far as the evidence discloses anything to the contrary, this was true. That Shoemaker subsequently determined to appropriate the articles to his own use and did so is not inconsistent with the want of knowledge of the fact by Casey. Nor was mere knowledge by Casey of Shoemaker's subsequent misconduct sufficient to render him subject to the penalty which Shoemaker properly incurred thereby. It not appearing that Casey went further than to refuse to divulge such information as he had, assuming that he had any, that Shoemaker should be punished furnished no reason why Casey should also. (Sedgwick on Damages, sec. 332.) The evidence was sufficient to justify a verdict against Casey for the value of the contents of the box containing the books and also for a nominal amount for the conversion of the other box.

That the verdict was excessive because given under the influence of passion and prejudice of the jury, however, is clear. The amount to be awarded in this class of cases is lodged in the discretion of the jury; but this discretion is not unlimited or to be exercised arbitrarily. It will not do to say that the jury are free to make the measure of punishment whatever they choose, without any just or reasonable relation to the wrong done. No definite rule can be declared as to when the court should interfere and when it should not; yet since a new trial may be ordered when it appears that the jury have acted under the influence of passion and prejudice (Rev. Codes, sec. [6] 6794), it follows that when the award is so large that it cannot be accounted for on any other theory and is wholly out of proportion to the wrong done and the cause of it, the conclusion is irresistible that it was measured by the passion and prejudice of the jury, rather than by an estimate made in the exercise of their discretion, and it becomes the duty of the court to set it aside. So far as a general rule on the subject can be stated, this seems to be the one recognized by the courts. (Sedgwick on Dam-

ages, sec. 388; *Saunders v. Mullen*, 66 Iowa, 728, 24 N. W. 529; *Texas Land and Cattle Co. v. Nations* (Tex. Civ.), 63 S. W. 915; *Flanary v. Wood*, 32 Tex. Civ. 250, 73 S. W. 1072; *International & G. N. R. Co. v. Telephone & Tel. Co.*, 69 Tex. 277, 5 Am. St. Rep. 45, 5 S. W. 517; *McCarthy v. Niskern*, 22 Minn. 90; *Buford v. Hopewell*, 140 Ky. 666, 131 S. W. 502.) Applying this [7] rule to the facts of this case, we think the award of the jury was out of all proportion to the wrong done, even upon the assumption that Casey was guilty of such misconduct as would call for punishment. Notwithstanding the court required the plaintiff to accept the reduction of one-half of the award, the reduced amount is, under the authorities cited *supra*, still out of all proportion to the extent of the wrong done.

In requiring the plaintiff to remit what it deemed the excess, the trial court evidently was of the opinion that the award of [8] compensatory damages was justified by the evidence. As we view it, the plaintiff was entitled to recover from Casey some amount, *viz.*, the value of the contents of the box of books less the value of the Encyclopedia, the possession of which plaintiff recovered from Shoemaker, together with nominal damages for the other box. But the gross value thus recoverable could not exceed the value alleged in the complaint. Excluding the Encyclopedia, the value of all the articles that came into the hands of Casey, so far as it was shown, is alleged to be the following: Sheet music, \$15; miscellaneous books, \$18. Add to this amount a nominal sum of \$1 for the conversion of the second box, and adding interest from the date of the conversion, which the court properly instructed the jury they might allow (Rev. Codes, sec. 6071), the gross sum chargeable to him could not exceed \$38. What amount the jury should allow for the detention of the Encyclopedia was not submitted to nor considered by them. If it be assumed that the jury should have found the value of the Encyclopedia and included it in their verdict—and this they were authorized to do, as we shall see hereafter—the amount of the verdict still cannot be accounted for, for upon the undisputed evidence this itself was of the value of at least \$50. It is

entirely possible that the jury, having had their prejudices aroused by the suggestion of Schemaker, who fraudulently took and converted the property, and by reason of the fact that the plaintiff is a woman, interpreting the evidence wrong as show the amount of compensatory damages and arbitrarily fixing the amount in the verdict presented as against both defendants for Schemaker's suggestion, making this error would render plaintiff whole for the wrong done her. On the whole and upon any theory of the case we are of the opinion that the appellant is entitled to a new trial. In this view we are confirmed when we come to examine the instructions indicating the theory upon which the case was submitted to the jury. The defendants requested the court to instruct the jury, in effect, that since it appeared from the evidence that plaintiff had recovered possession of the Encyclopedia before the bringing of the action, she was not entitled to recover the value of it, the law being that she could not recover it and also its value. The request was refused and the case was submitted under instructions which authorized the jury to find and return a verdict for all the articles alleged to have been converted, including the Encyclopedia. While it may properly be said that the requested instruction was objectionable in that it would have permitted the jury to regard the recovery of the books as *pro tanto* a complete defense to plaintiff's action, whereas it was proper to consider it only in mitigation of damages (*Watson v. Coburn*, 35 Neb. 452; *Murphy v. Hobbs*, 8 Colo. 17, 5 Pac. 637; *Cooley on Torts*, p. 75; *Moak's Underhill on Torts*, p. 97), those submitted by the court were no less so, because they allowed the jury to find a verdict for the full value of these books notwithstanding plaintiff had them in her own possession at the time the action was brought and at the time of the trial.

Other errors are assigned and discussed by counsel. We do not find prejudicial error in any of them. The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
MARCH TERM, 1914.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,
THE HON. SYDNEY SANNER, } **Associate Justices.**

SHOUDY, RESPONDENT, v. REESER ET AL., APPELLANTS.

(No. 3,354.)

(Submitted February 10, 1914. Decided March 7, 1914.)

[140 Pac. 000.]

***Fraud — Evidence — Sufficiency—Verdict—Court may Direct,
When—Erroneous Instruction.***

Fraud—Evidence—Sufficiency.

1. Evidence in an action for damages for fraud charged by plaintiff to have been practiced upon him in the sale of land, the defendant, acting in collusion with a civil engineer who had been employed by plaintiff to survey the land, falsely representing to him that the tract contained a much larger acreage suitable for fruit growing than was actually embraced in it, *held* sufficient to sustain a finding in plaintiff's favor.

Same—Verdict—Court may Direct, When.

2. Where the facts in an action for fraud are not controverted and furnish the basis of but one inference, *i. e.*, that the defendant is guilty of the fraud alleged, the court may infer the fraud as a matter of law and direct a verdict in favor of plaintiff.

Same—Erroneous Instruction.

3. In the absence of active participation by defendant in the false representations made to plaintiff by the latter's agent, defendant could not have been held accountable even though he had knowledge of the agent's wrongdoing; hence an instruction that plaintiff should recover

from defendant if the real facts had been suppressed by the agent with the knowledge of defendant was affirmed.

As to insufficiency of evidence of injury for false representation issue, court held for plaintiff in April Term 1913. As to sufficiency of evidence of injury to plaintiff in connection with sale of land, no sufficient basis to support change of verdict was made in April Term 1913.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

Action by J. E. Sherry against P. H. and Julia K. Reeser. From a judgment for plaintiff and an order denying their motion for a new trial defendants appeal. Affirmed.

Mr. P. C. Webster and M. E. C. Kurtz, for Appellants, submitted a brief and argued the cause orally.

Mr. J. D. Taylor and Mr. L. O. Johnson, for Respondent, submitted a brief; Mr. Taylor argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for fraud practiced by the defendants upon the plaintiff in the sale to him of 120 acres of land situate in Ravalli county. Defendants are husband and wife. The fraud alleged is that defendants knowingly and falsely represented to the plaintiff that the area sold to him included sixty-five to seventy acres of bench land, whereas it included only thirty-five acres; that defendants further, by collusion with the agents of plaintiff, suppressed this fact, and that by reason of the false representations so made, upon which he relied, and by reason of the suppression of the fact by defendants by collusion with plaintiff's agents whereby he was prevented from discovering the truth, plaintiff suffered damage in the sum of \$2,550. The defendants, admitting that they sold the land to the plaintiff, denied generally all the other allegations of the complaint. The plaintiff had verdict and judgment for \$2,000. Defendants have appealed from the judgment and order denying their motion for a new trial. They allege insufficiency of the evidence to justify the verdict and error in the instructions. The insufficiency of

the evidence was questioned both by motion for nonsuit and on motion for a new trial, and error is assigned upon the action of the court on both motions. Whether we consider the case as made by plaintiff's evidence alone, however, or the whole case as it was submitted to the jury, we think the verdict should not be disturbed.

The negotiations for the purchase of the land were opened by [1] the plaintiff in November of the year 1909. Having ascertained that defendant F. H. Reeser owned the land, plaintiff sought him out at his place of business. This defendant was then engaged in conducting a real estate business in Hamilton, Ravalli county, and had been so engaged for two years. Plaintiff made inquiry of him as to the character and price of the land, signifying a wish to buy it. A day or two later both defendants accompanied the plaintiff, drove to the land to permit the latter to make an inspection of it. Defendant Julia K. Reeser remained in the conveyance and took no part in the inspection; nor did she thereafter take part in the negotiations. The inspection was confined exclusively to a body of bench land on an elevation of from fifty to seventy feet above the general level, and all the negotiations touching bench land referred exclusively to this. At that time the plaintiff, being without experience in estimating acreage, inquired what area there was of bench land suitable for raising fruit. Defendant F. H. Reeser (hereafter designated by his surname only) said that there were from sixty-nine to seventy acres. The price demanded was \$10,000. Within a few days plaintiff saw Reeser again and told him that he would take the land at \$9,000 if Reeser would guarantee that there were sixty acres on the bench. Reeser declined to make the guaranty and advised plaintiff to have a survey made. He agreed, however, to accept the price offered, provided it should be paid in cash. It was then agreed that should the negotiations result in a sale, the plaintiff should pay the purchase price partly in cash, and the balance in deferred payments, the last to be made on or before May 1, 1910. Thereupon plaintiff employed one Hawkins, a professional engineer, to make a survey to ascertain definitely the area of bench

land, and arranged to have Hawkins report the result to him in New York, the place of his residence. He deposited \$100 in the First National Bank at Hamilton, together with a written option from Reeser, with instructions to the bank to pay the money to Reeser and forward the option to himself in case Hawkins' survey, of the result of which the latter was to inform the bank, disclosed that the area of bench land was approximately sixty-eight acres. Plaintiff then returned to New York after instructing his attorney at Hamilton to prepare the contract of sale for signature by defendants in case he secured the option, and finally determined to exercise it by purchasing the property. Hawkins was to forward to plaintiff, with his report, a blue-print map of his survey, showing the area of the bench. Thereafter and prior to the execution of the contract of sale the following correspondence passed between the plaintiff and Hawkins and Reeser:

"Hamilton, Mont., Dec. 23, 1909.

"Mr. J. Edwin Shoudy,

"27 Williams St., New York:

"Dear Sir: I have completed the survey of the land that you wish to buy from Mr. Reeser, and reported to the First National Bank that it was all that you wished, and I told them to pay over the \$500. (This amount was \$100.) It took me longer than I expected to complete the job and it will cost you a little more than I thought it would at first. I am enclosing my bill for the remainder.

Yours very truly,

"O. J. HAWKINS."

"Hamilton, Mont., Jany. —, 1910.

"Mr. J. E. Shoudy,

"27 Williams St.

"My Dear Shoudy: Your letter of Dec. 30th, 1909, at hand. Mr. Hawkins told the bank and also me that there were over 70 acres in the bench and I asked him to advise you, which he said he would.

Yours truly,

"F. H. REESER."

“Hamilton, Montana, Jan. 12th, 1910.

“Edwin Shoudy,

“New York City.

“Sir: I received your telegram and was sorry to learn that you didn't receive blue-prints, and tracing. I am inking in the detail and sending that to you. If you just want 65 acres of orchard land I would advise you to buy, because that is one of the prettiest benches that there is in the valley. I am sorry that I have kept you waiting unknowingly so long. I trust that you heard from the abstract company. It won't be necessary to make another survey to get your title examined. Hoping this is satisfactory.

Truly yours,

“O. J. HAWKINS.”

On January 21 defendant Reeser wrote plaintiff as follows:

“I have just returned from St. Paul * * * . It would have been better had you looked into these matters when you were here. Mr. Hawkins told me that you wanted him to find out if there was more than 70 acres in the bench and he said when he found there was he stopped chaining.”

The letter by Reeser under date of January — was apparently in reply to the following, written by plaintiff about December 1, 1909.

“Mr. F. H. Reeser,

“Hamilton, Mont.

“My dear Mr. Reeser: I have received the option forwarded to me by the First National Bank but have not yet received a report from Mr. Hawkins. If he reports approximately 68 acres in the tract of which we spoke I shall almost certainly exercise my option.

Yours very truly,

“J. E. SHOUDY.”

On January 24 Hawkins telegraphed plaintiff:

“Hamilton, Jan. 24, 1910.

“To Edwin J. Shoudy,

“No. 27 Williams St., New York City.

“There is at least 65 acres in the upper bench.

“O. J. HAWKINS.”

Hawkins did not furnish the map. Relying upon the information received from him as to the result of the survey, however,

the plaintiff determined to exercise the option, and there attorney prepared the contract of sale in accordance with instructions already given. This was executed and delivered February 1. It provided for the payment of \$9,000, of which \$2,100, including the \$100 paid for the option, was to be paid on or before March 15, and \$3,900 on or before May 1, both of these sums to bear interest from the date of the contract at the rate of ten per cent per annum. The conveyance was deposited in the First National Bank, and the deferred payments were to be made, to be delivered to the bank upon the deposit by him of the last payment. The payments were duly made and the conveyance delivered on May 1. Though the plaintiff took immediate possession, he did not cover any discrepancy in the area of the bench until a middle of June. This he did by means of a survey which was made by one Oertli, a professional engineer of experience and county surveyor of Ravalli county. He then ascertained that the area of bench land did not exceed thirty-five acres. The engineer testified it would be impossible for a surveyor to find sixty-five acres on the bench unless he made a mistake, and he could not do this "through his eye or instrument." More than the high bench there was no land of that character in the area sold to plaintiff. Defendant Reeser had bought the land from one Cooper in February, 1909. Prior to that time the land had been listed with Reeser for sale; when he did this Reeser that there were about forty acres of bench land. The engineer, called as a witness for plaintiff, testified that in accordance with the request from plaintiff, he saw Hawkins and asked him to make his report. He stated that he had been informed by plaintiff before he went to New York that the latter had arranged with Hawkins to make the survey, but did not know when it was made it.

The foregoing is the substance of the evidence introduced for the plaintiff. The defendants both testified in their own defense. Reeser corroborated the statements of the plaintiff as to the course of the negotiations resulting in the sale. He

deny, however, that he represented to the plaintiff that there were sixty-nine or seventy acres in the bench land, or that he knew that Hawkins' statement to the plaintiff was not true. He did not remember the statement made to him by Cooper but he did not deny that it was made or that it was true. He denied that he had any knowledge of the survey by Hawkins or had any communication with him other than when he communicated with him upon request of plaintiff in order to hasten the report of the survey, or as to the character of the report the latter was to make to the plaintiff, except such as he ascertained from Hawkins at that time. He denied that he had induced or attempted to induce Hawkins to make a false report. The defendant Julia K. Reeser stated that she knew Hawkins but had never suggested to him to make a false report to the plaintiff. Incidentally the fact was elicited from her that Hawkins had at various times been employed by her husband to make maps for him in connection with his real estate transactions. One Blakeslee, an engineer called by the defendants, testified that he had made a survey for the defendants in June, 1910, and found 69.04 acres of what he classed as bench land in the entire tract, but only 43.03 in the upper bench. Hawkins was not called as a witness; nor was his deposition offered, though the place of his residence was known to defendants. It does not appear from the testimony of any witness why Blakeslee was employed to make the survey at that time, unless it be explained by the fact that about the time the survey was made, the plaintiff discovered the discrepancy in the area of bench land and thereupon negotiations were entered into between him and Reeser with a view of adjusting the controversy arising out of it. These negotiations were pending until a short time prior to the beginning of this action.

It will be noted that the testimony introduced by the defendants does not seriously controvert the case as made by the plaintiff, or tend to rebut or destroy the inferences to be drawn from the facts and circumstances established by it. The uncontroverted facts, with the legitimate inferences therefrom, are: That plaintiff desired to purchase the land because it included the

bench which he deemed especially suited for fruit growing; that he did not care to purchase unless the area was approximately sixty-eight acres; that he was not a judge of acreage, which Reeser knew; that Reeser represented to him that the area of the bench was sixty-five or seventy acres; that Reeser knew that this was not true; that he knew that the plaintiff, in order to inform himself, had employed Hawkins to make a survey; that he knew that plaintiff, being about to return to New York, was dependent upon the integrity and loyalty of Hawkins; that Hawkins' report was false, and, knowing that the sale would not be consummated if plaintiff was informed of the discrepancy in acreage, Reeser told Hawkins, as stated in his letter written in January, 1910, to report that there were seventy acres when in truth there were not more than half that number; and that he knew when he signed the contract and afterward when he accepted plaintiff's money, that he was doing it upon the basis of false information furnished by Hawkins, or his concealment of the truth, whereas if Hawkins had made an honest report, plaintiff would not have taken and paid for the option, or thereafter consummated the purchase. When we read together Hawkins' letters and telegram to the plaintiff, the conclusion becomes irresistible not only that he deliberately betrayed his unsuspecting employer, but also that he had a purpose in doing so. Hesitating at first to make a false statement as to the result of his work, though advising the purchase, he gave no definite information, thus indicating an indisposition to betray his employer. Finally in the telegram of January 24—the only communication making a definite statement—he deliberately made the false report: "There is at least 65 acres in the upper bench." Why did he encourage the plaintiff to make the purchase? Why did he refrain from telling the truth as he knew it at the beginning? Why did he finally make a deliberately false statement as to the number of acres in the bench? There can be but one explanation, viz., that in some way he became interested in having the sale consummated; for it cannot be conceived that the average man will make a deliberately false statement unless he is

prompted to do so by some motive. Whether he received a consideration for betraying the plaintiff does not appear. His conduct may be explained by his friendly relation with Reeser growing out of his former employment in a professional way by the latter. But what his inducement was is not important to inquire. So far as he is concerned, it is sufficient that he not only suppressed the truth, but made a misrepresentation of the fact which he had been employed to ascertain and communicate. That Reeser was in collusion with Hawkins is a legitimate inference from the fact that, knowing that Hawkins' communication to the bank was false and that he intended to make the same report to the plaintiff, Reeser nevertheless told him to make it. The letters written by Reeser to plaintiff—particularly the one without date, evidently written in reply to inquiries by plaintiff—do not furnish the basis for any other inference, unless it be that Reeser, though he knew that Hawkins' statement as to the acreage was false, made use of it to lead plaintiff to take up the option and finally make the purchase. The result is the same whether we indulge the one inference or the other; for the fact is established that even if Reeser was not in collusion with Hawkins, he told Hawkins to forward information which he as well as Hawkins knew to be false. Whether we regard this communication as a deliberate misrepresentation or suppression of a fact that he was under the circumstances bound to disclose, he practiced a palpable fraud upon the plaintiff. (Rev. Codes, sec. 4978; *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950.) Since the plaintiff had employed Hawkins to make the survey in order to gain the information he desired, defendant might have remained silent with perfect safety. Nothing else appearing, he was not called on to make any disclosure whatever.

[2] While "actual fraud is always a question of fact" (Rev. Codes, sec. 4980), and while it is usually the province of the jury to draw the proper inferences from the facts and circumstances proven, under the evidence as presented here the court might properly have assumed the guilt of Reeser as a matter of law and submitted to the jury the question of damages only; for it dis-

closes without substantial conflict all the elements necessary to make a case of fraud, viz.: (1) That defendant made a representation intending that plaintiff should act upon it; (2) that the representation was false; (3) that plaintiff believed and relied on it; (4) that he acted upon it to his damage (*Power & Bro. v. Porter, supra*); and this is true whether we indulge the inference that Reeser was in collusion with Hawkins or not. When facts are not controverted and furnish the basis for but one inference—that the defendant is guilty of the fraud alleged—the court may infer the fraud as a matter of law and direct a verdict as in any other case. (*Fruit Dispatch Co. v. Russo*, 125 Mich. 306, 84 N. W. 308; *Reynolds v. Muncie*, 131 Minn. 380, 98 N. W. 187; *Bender v. Kingman*, 62 Neb. 87 N. W. 142; 20 Cyc. 123.)

The contention that the evidence is insufficient to establish fraud is therefore wholly without merit.

The court submitted the case to the jury on the theory that the fraud which the evidence tended to establish was the result of a conspiracy between Hawkins and Reeser, whereby they misrepresented the information which the plaintiff employed Hawkins to procure for him. As we have seen, the evidence was sufficient to warrant a recovery either on this theory or upon the theory that Reeser voluntarily confirmed Hawkins' false statement and then availed himself of the result. The instructions were correctly formulated on the theory adopted, except in the third paragraph in which the jury were told, in substance, that the plaintiff would be entitled to recover if it was established by a preponderance of the evidence that the facts as to the arable bench land had been suppressed by Hawkins and this had been done "through collusion or knowledge of the defendants." This instruction was clearly erroneous; for, as has already been said, if Reeser had taken no part in misleading the plaintiff, he could not be held accountable for Hawkins' misconduct even though he had knowledge of it. Hawkins was the agent of the plaintiff and his fidelity to his employer was of no concern to Reeser. Since, however, the evidence conclusively establishes his participation,

cipation in Hawkins' wrongdoing, the error in the instruction could not have wrought prejudice.

Under the evidence, defendant Julia K. Reeser did not participate in the negotiations, nor did she take any part in the transaction further than to join in the execution of the contract of sale and the formal conveyance. She has, however, made joint cause with her husband throughout, and no suggestion has been made in her behalf that the judgment ought not to be allowed to stand as to her. We have, therefore, not felt required to notice this feature of the case or to grant her relief which she does not demand.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

ON MOTION FOR REHEARING.

(Submitted March 30, 1914. Decided April 22, 1914.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In a petition for a rehearing in this case, counsel for defendants call attention to the fact that in the opinion of the court it is erroneously stated that the Blakeslee survey was made in June, 1910, whereas it is shown by the record to have been made in June, 1912. We are glad to make the correction and also to eliminate from the opinion any possible inference unfavorable to the defendants, based upon the fact that the survey was made at the time stated. We think it apparent, however, that the comment made in this connection sufficiently indicates that the court did not deem the date of the survey or the fact that it had been made, as of special import. We are also glad to correct another erroneous statement made in the opinion to which our attention is called. In the same connection it is stated: "Hawkins was not called as witness; nor was his deposition offered, though the place of his residence was known to defendants." Defendant

Shawnee stated that he did not know where Hawkins was: that
 if Shawnee was not present, that he was not present. The
 statement in the evidence given is that the witness was not
 the person who was present from the statements of Shawnee et
 al. that Hawkins at the time of the trial was present, standing
 in front of the witness. Nevertheless from the facts that Shawnee
 and Shawnee was not in evidence with Hawkins in standing in the
 presence of the witnesses which he did not know by the fact
 was not present at the time of the trial. It was of the nature of the
 statement that Shawnee was present as a witness to show
 that an investigation of the facts had been made to secure his testi-
 mony. The facts and facts were in the absence of such show-
 ing, justified in showing that if he had been present, his
 testimony would not have been sufficient in the evidence. In
 view of the statements made in the evidence in other re-
 spects, however, we do not think this case of very great
 importance. We think that in the light of the statements given
 and the other evidence given to us in the evidence shows
 conclusively that Shawnee was a party to Hawkins' prosecution and
 that he was properly held as answer for the facts charged.

There is nothing in the evidence calling for further comment.
 A rehearing is accordingly denied.

MR JUSTICE HALLWAY and MR JUSTICE SANNES concur.

**LYON, RESPONDENT, v. UNITED STATES FIDELITY &
GUARANTY CO., APPELLANT.**

(No. 3,356.)

(Submitted February 14, 1914. Decided March 8, 1914.)

[140 Pac. 86.]

***Receivers—Wrongful Appointment—Action on Bond—Pleading
and Proof—Judgment—Estoppel—Damages—Evidence.*****Receivers—Wrongful Appointment—Action on Bond—Pleading and Proof.**

1. *Held*, that to warrant recovery on a bond given pursuant to section 6701, Revised Codes, in a suit in which the appointment of a receiver was asked to take charge of the personal property of an alleged partnership, plaintiff was not required to allege and prove a specific adjudication in the primary suit that the appointment of the receiver was procured wrongfully, maliciously or without sufficient cause, or that the receivership was formally vacated in response to a motion to that effect; *held*, further, that such adjudication may be implied from the final decree adjudging the ownership of the property in the defendant,—plaintiff in the action on the bond.

Same—Nature of Remedy.

2. Receivership is an extraordinary remedy of ancillary character, the chief reason for its allowance being to husband the property in litigation for the benefit of the person who may ultimately be found entitled thereto.

[As to when the appointment of a receiver is proper, see notes in 64 Am. Dec. 482; 72 Am. St. Rep. 29. As to appointment of receiver before suit is instituted, see note in Ann. Cas. 1912B, 236.]

Same—Scope of Order.

3. The appointment of, or refusal to appoint, a receiver pending determination of an action, does not conclude either of the parties upon the ultimate question involved.

Judgments—What Matters Concluded by.

4. As between the parties to an action, the judgment is an adjudication, not merely of the conclusions expressed, but of everything necessarily included in them.

Appeal and Error—Appellant may not Complain, When.

5. Of an error against respondent, appellant may not complain.

Receivers—Action on Bond—Estoppel.

6. Plaintiff was not estopped to question the propriety of the appointment of a receiver, by his failure to appeal from an order refusing to vacate the receivership.

Same—Pleadings—Estoppel.

7. Where plaintiff alleged the value of partnership property involved in an action in which he asked for the appointment of a receiver, to be of the value of \$4,000, and defendant denied that it was worth more than \$1,500, the latter was not estopped to assert, in an action on the receiver's bond, that the property was of a greater value than that claimed by him in the first action.

Same—Damages—Evidence—Loss of Property.

8. Evidence of the value of personal property either lost or destroyed while in charge of a receiver was properly admitted as an element of the damages flowing from the wrongful procurement of his appointment.

Appeal from District Court, Jefferson County; J. B. Poindexter, Judge.

ACTION by John W. Lyon against the United States Fidelity & Guaranty Company. Judgment for plaintiff. Defendant appeals from it and an order denying it a new trial. Affirmed.

Messrs. Gunn, Rasch & Hall, for Appellant, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

The bond provided for in section 6701, Revised Codes, is merely to indemnify the defendant for damages sustained during the time a receiver has possession, whose appointment was procured wrongfully, maliciously or without sufficient cause, and defendant is entitled to such damages only when he has by proper motion and showing in the court appointing a receiver had such appointment vacated on such grounds, or has on appeal from an order refusing to vacate the appointment reversed the lower court. (See *Pagett v. Brooks*, 140 Ala. 257, 37 South. 263.)

For a full and clear discussion of the difference between the terms "removal," "discharge" and "vacate" as used in connection with receivers, see Alderson on Receivers, secs. 635 and 639.

The fact that the final decision in the original action was in favor of the defendant therein did not determine that the appointment of the receiver in said action was procured wrongfully, maliciously or without sufficient cause. (*Pagett v. Brooks*, above; *Ferguson v. Dent*, 46 Fed. 88.)

In *Post v. Dorr*, 4 Edw. Ch. (N. Y.) 425 (412), the court said: "Submitting to the appointment of a receiver by those who are before the court and had a right to object and who could have appealed from the order, if dissatisfied with it, but did not, is such an acquiescence in the order as renders it the law of the case with respect to the right to have a receiver." The appointment of a receiver cannot be assailed collaterally. (*Greeley v. Provident Savings Bank*, 103 Mo. 212, 15 S. W. 429; *Neeves v. Boos*, 86 Wis. 313, 56 N. W. 909.) In *State v. Shelton*, 238 Mo.

281, 142 S. W. 417, the court said: "In the third place, the appointment of a receiver may not be assailed collaterally. Unrevoked by motion below or by appeal, as here, that appointment must stand as against a collateral attack. (*Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962; *State v. Foster*, 225 Mo. 171, 125 S. W. 184.)" See, also, *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250; *Campbell v. H. B. Claflin Co.*, 135 Ala. 527, 33 South. 275; *Coverdill v. Seymour* (Tex. Civ. App.), 56 S. W. 221, 94 Tex. 1, 57 S. W. 37.) As to what is a collateral attack is fully discussed in *Burke v. Interstate S. & L. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879. An appeal from an order appointing a receiver is a direct attack. (*Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339.) *Joslin v. Williams*, 76 Neb. 594, 107 N. W. 837, affirmed on rehearing in 112 N. W. 343, clearly shows that in order to maintain an action on such a bond as this, it must first be judicially determined, in the manner provided by law, in the original action that the receiver was wrongfully appointed. In *Thornton-Thomas Mercantile Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10, the appointment of a receiver was first vacated in a manner provided by law in the original action before an action was started against the plaintiff and his surety on the undertaking. (See, also, *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 South. 870.)

The order refusing to vacate the appointment of the receiver, being an appealable order, was, in effect, a final judgment on the merits, so far as the question of the appointment of the receiver was concerned. (*In re Dougherty*, 34 Mont. 336, 86 Pac. 38; *Lake v. Bonyng*, 161 Cal. 120, 118 Pac. 535; *Rodgers v. City of Ottawa*, 83 Kan. 176, 109 Pac. 765; 26 Cyc. 1223-1225.) The motion for the order to vacate the appointment and such order refusing to vacate must be construed to cover all matters that might have been litigated on such hearing, and defendant was required to present all grounds he had in support of such motion. (23 Cyc. 1223-1225; *Moore v. Horner*, 146 Ind. 287, 45 N. E. 341; *Leaverton v. Albert*, 116 Md. 252, 36 L. R. A. (n. s.) 990, 81 Atl. 601; *Hope v. Shevill*, 137 App. Div. 86, 122 N. Y.

Supp. 127; *Kellogg v. Maloney*, 152 Fed. 405, 81 C. C. A. 531; *In re Snowball's Estate*, 156 Cal. 240, 104 Pac. 444.) The surety can plead a judgment in favor of its principal, ref- - to vacate the appointment of a receiver, as a bar or estoppel, although the surety was not a party to the action in which judgment was rendered. 23 Cyc. 1273, 1527; 32 Cyc. *Lamb v. Wahlenmaier*, 144 Cal. 91, 103 Am. St. Rep. 66, 77 765; *Stevens v. Carroll*, 131 Iowa 170, 105 N. W. 653; *St. Coste*, 36 Mo. 437, 88 Am. Dec. 143; *Sonnenbuhl v. Texas (Antee etc. Co.)*, 23 Tex. Civ. App. 436, 56 S. W. 143.) Sec. 6702, Revised Codes, requires the receiver to give a bond for faithful discharge of his duties; therefore, if he did not procure care for the property taken into his possession, or lost part or failed to return it upon the order of the court, then the defendant must look to the receiver and his surety for his damages for such acts, and not to the plaintiff and his surety on the undertaking given at the time the receiver was appointed. (Hig. Receivers, sec. 270; *Kaiser v. Kellar*, 21 Iowa, 95; *Robins Arkansas Loan & Trust Co.*, 74 Ark. 292, 85 S. W. 413; *Coddill v. Seymour*, 94 Tex. 1, 57 S. W. 37.)

Mr. Ike E. O. Pace, for Respondent, submitted a brief, argued the cause orally.

The judgment against the original plaintiff is binding on the surety, the appellant here; and the surety is precluded from questioning its merits, though the original plaintiff defaulted. (2 Black on Judgments, sec. 587.) The failure of the plaintiff to prosecute his suit is a virtual admission by him that he had no adequate cause of action. (Murfree on Obligations, Bonds, sec. 397.) The judgment being based upon a default, the entire issue must have been found for the defendant, which necessarily precludes the rightful appointment of a receiver. Resort may be had to the pleadings to determine whether the issue was decided. (*National Foundry & Pipe Works v. Oconto W. S. Co.*, 183 U. S. 216, 46 L. Ed. 157, 22 Sup. Ct. Rep. 100; *Harper v. Keys*, 43 Ind. 220.) In construing the judgment

the court in which the property is declared to belong to the plaintiff, a reference to the pleadings or the record is conclusive that the receiver was procured wrongfully or without sufficient cause. (*Texas Savings-Loan Assn. v. Banker*, 26 Tex. Civ. App. 107, 61 S. W. 724.) The dismissal of a suit for want of prosecution amounts to a determination that the temporary injunction issued in the course of it was improperly granted and the same is thereby set aside and discharged. (Hilliard on Injunctions, sec. 65; *Dowling v. Polack*, 18 Cal. 625.) The abandonment of the suit by the plaintiff procuring the appointment of a receiver or an injunction order is alone sufficient ground for an action upon a bond for the wrongful procurement of the receiver or injunction order. (*Barthe v. City of New Orleans*, 42 La. Ann. 43, 7 South. 70.) Failure to prosecute the receivership action and judgment thereon operates as a final adjudication giving right of action upon the bond in injunction. (16 Am. & Eng. Ency. of Law, 456.)

The question whether plaintiff procured the appointment of the receiver improvidently rests upon the final determination of the facts at issue in the receivership action. This issue cannot be determined by appeal from the order appointing the receiver. There can be no determination of the facts upon which the original plaintiff procured the receiver's appointment other than by final judgment in the receivership case. Hence the non-appeal from the order appointing the receiver is not material to a suit upon this bond. (2 Black on Judgments, sec. 509; Wharton on Evidence, sec. 871; *Webb v. Buckelew*, 82 N. Y. 555.) When the original defendant obtains judgment, "the entry of judgment would seem to have the effect of terminating the receiver's functions." (*Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 South. 870.) The turning over of the property to the original defendant, by order of the court subject to the receiver's fees cannot be interpreted as holding that the receiver was properly appointed. (*Cutter v. Pollock*, 4 N. D. 205, 50 Am. St. Rep. 644, 25 L. R. A. 377, 59 N. W. 1062, 7 N. D. 631, 76 N. W. 235.) The final decree in the receivership case terminates the functions

of the receivership, even though there is no formal order discharging the receiver. (*Very v. Watkins*, 23 How. (U. S.) 469, 16 L. Ed. 522.)

MR. JUSTICE SANNER delivered the opinion of the court.

Action on a bond arising out of the following circumstances: One Perrine brought suit in the district court of Deer Lodge county against J. W. Lyon, the respondent on this appeal, alleging the existence of a copartnership between himself and Lyon in the business of contract grading and roadwork, and in the ownership of twenty-three head of horses and certain grading equipment, all of the value of \$4,000; alleging that Lyon had applied all the receipts and profits of the business to his own use and had refused to account for the same; alleging that Lyon was about to remove the property from Deer Lodge county, and that there was immediate danger of the property being removed beyond the jurisdiction of the court and lost, materially injured, destroyed and unlawfully disposed of; and praying for a dissolution of the partnership, for an accounting and for the appointment of a receiver to take charge of the property, sell it, pay the liabilities of the firm and divide the surplus. On August 18, 1908, an order *ex parte* was made by the court for the appointment of a receiver to take charge of and preserve said property. On August 22, 1908, one Calvert was clothed with that authority, but before he was permitted to take possession of the property, the court, on November 14, 1908, required Perrine to file the bond which forms the basis of the present action. This bond was executed by Perrine and the appellant, the United States Fidelity & Guaranty Company, for the sum of \$3,000 and conditioned for the payment to Lyon of all damages he might sustain by reason of the appointment of the receiver and the entry by the receiver upon his duties, if such appointment was procured "wrongfully, maliciously or without sufficient cause." The receiver took possession of the property on December 1, 1908. Thereafter Lyon answered, in effect denying the partnership or any ownership or interest of Perrine in the property.

On May 26, 1910, the cause of *Perrine v. Lyon*, having been removed to the district court of Jefferson county, was called for trial, but Perrine did not appear and was not represented; whereupon Lyon submitted evidence in support of his contentions, and judgment by the court was entered decreeing the sole ownership of the property to be in him, ordering the receiver to deliver the property to Lyon, he to hold it subject to the lien of the receiver for his fees, costs and disbursements. On May 27, 1910, Lyon made demand upon the receiver for the property, and on June 1, 1910, the receiver, having had possession of the property about eighteen months, delivered to Lyon thirteen head of horses and part of the equipment.

The present action was commenced on July 8, 1911. The complaint, besides setting up the foregoing facts, alleges that the allegations of Perrine's complaint were willfully false and made maliciously and without sufficient cause; that Perrine procured the appointment of the receiver wrongfully, maliciously and without sufficient cause; that in consequence of the appointment of the receiver, Lyon has been damaged as follows: \$3,000, the value of the property not returned to him by the receiver; \$3,000, the value of the use of the property while in the hands of the receiver and \$1,000 in money and time expended defending himself against the action of Perrine and the receivership therein; that the receiver has a claim against the property amounting to \$3,600, and that demand was made upon Perrine and the appellant surety company to pay the penal sum of the bond, but this they have wholly failed and refused to do. A demurrer to the complaint was overruled and the appellant answered, joining issue upon certain allegations of the complaint; the burden of the answer, however, is that on September 5, 1908, Lyon filed in the suit of *Perrine v. Lyon* a motion to vacate the order appointing the receiver, upon the ground of the insufficiency of the application therefor, and on the ground that no bond had been exacted as required by section 953 of the Code of Civil Procedure, which motion being denied and not appealed from, Lyon is estopped to now contend that the appointment of

the receiver was procured wrongfully, maliciously or without sufficient cause; and that Lyon by his pleading in *Perrine v. Lyon* denied that the value of the property was to exceed \$1,500 and alleged the cost of the same to have been \$1,400, by which denial and allegation, as well as by the judgment in *Perrine v. Lyon*, the latter is estopped to now contend that said property had any greater value than \$1,500 when the receiver took possession of the same.

Upon the trial no attempt was made to establish the item of \$1,000, damages for loss of time and money expended in the defense of Perrine's suit; but the cause was submitted upon the value of the property not returned and upon the value of the use of all the property during the receiver's possession of it. The verdict awarded respondent \$2,700 and judgment was entered accordingly. Motion for new trial was made and denied; hence these appeals.

Assignment is made of eleven alleged errors, by which it is sought to present three questions, viz.: Is this action maintainable upon the pleadings and the record? Was it permissible for the respondent to assert any value for the property in excess of \$1,500? Was it error to receive evidence and to instruct the jury concerning the value of the property not returned by the receiver to the respondent?

1. It is contended that this action is not maintainable upon the face of the record, because it was necessary to allege and prove an adjudication in *Perrine v. Lyon* that the appointment [1] of the receiver was procured wrongfully, maliciously or without sufficient cause; and this, it is said, not only does not appear from the complaint, but is specifically negatived by the respondent's admission that he did move to vacate the appointment, that his motion was denied and that he failed to take an appeal. The argument is that the receivership must be formally vacated in the primary suit either upon motion in the court of original jurisdiction or upon appeal; that the order of the district court denying the motion to vacate was an adjudication in favor of the appointment, since no appeal was taken; and

that the present attempt of the respondent to charge the appointment to have been made wrongfully, maliciously or without sufficient cause, is a collateral attack.

The bond which forms the basis of this action was given pursuant to the provisions of section 6701 of the Revised Codes; it is conditioned, as that statute provides, for the payment of all damages sustained "in case the applicant shall have procured such appointment wrongfully, maliciously or without sufficient cause." We see nothing in this language to indicate that a specific finding in the primary suit against the propriety of the receivership is an essential prerequisite to an action upon the bond, and we look in vain for any intimation that such finding must be in the nature of an order upon motion to vacate. What the statute requires and what the bond expresses as a condition of liability is a fact, *viz.*, that the appointment was procured wrongfully, maliciously or without sufficient cause; and assuming that, to state a cause of action of this kind, the complaint must show an adjudication of that fact in the primary suit, it does not follow that such adjudication must in every case occur in response to a motion to vacate or that it cannot be implicit in the final judgment. In the case of *Pagett v. Brooks*, 140 Ala. 257, 37 South. 263, relied on by appellant, the condition of the bond was that required by the statute of Alabama, *viz.*, the obligees "shall pay or cause to be paid all damages which any person may suffer by the appointment of such receiver if such appointment be vacated." The cause in which the receiver was appointed was determined upon final hearing adversely to the complainants and their bill was dismissed; but no order was made vacating the appointment of the receiver. The court said: "The question presented is whether a final decree upon the merits dismissing the complainant's bill, without more, operated to vacate the appointment of the receiver within the meaning of the statute and the condition of the bond. It cannot be seriously doubted that the burden is upon the plaintiffs to show by averments and proof, in order to entitle them to a recovery, that the appointment of the receiver was vacated. His removal or

discharge, if it be conceded that such was the effect of the decree, will not suffice. There is a clear distinction between vacating the appointment of a receiver and his removal or discharge.

* * * To vacate the appointment is to set aside the order of appointment because improvidently granted, the motion for which is based on the circumstances and conditions attending the appointment. * * * The statutory requirement of giving this bond * * * was simply to afford indemnity to a party who has suffered damages by reason of the improvident appointment of a receiver, and who has availed himself of the opportunity afforded him by the statutes of having the appointment vacated by an order of the chancellor or of this court." Counsel for appellant assert that the effect of the Alabama and Montana statutes is the same, because one way of establishing that a receivership was wrongfully procured is by an order of vacation; but surely this assertion answers itself. Our statute requires a fact, the Alabama statute requires an order of a specific kind; ours is directed to the wrongful act of a party, theirs to the improvident act of the court; ours emphasizes substance, theirs form. Whatever may be thought of the general reasoning of the *Pagett Case*, it is expressly grounded upon a provision so much narrower than ours, both in letter and in spirit, that the decision cannot have any value as a precedent for us.

Since our statute is designed to provide indemnity against wrongful receiverships, it has special application to those cases in which the appointment is wrongful because the plaintiff had no right thereto upon the merits. But this fact is not finally determinable anywhere short of trial. Receivership is an [2] extraordinary remedy of ancillary character; it cannot in itself be the ultimate object of a suit but is permissible only in an action pending for some other purpose, and the chief reason for its allowance is to husband the property in litigation for the benefit of the person who may be found entitled thereto. (Rev. Codes, secs. 6698-6704; *Benepe-Owenhouse Co. v. Scheidegger*, 32 Mont. 424, 80 Pac. 1024; *Villa v. Grand Island Electric Light etc. Co.*, 68 Neb. 222, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, 63

L. R. A. 791, 94 N. W. 136, 97 N. W. 613.) Hence such allowance in nowise affects the main controversy or determines the final result. (High on Receivers, 4th ed., sec. 6.) When, therefore, the plaintiff presents a sufficient *prima facie* case, the order will usually be made without inquiring into the merits of the case at large, and no showing upon the merits which the defendant can make before trial will absolutely entitle him to a vacation of the order. (34 Cyc. 129, 160.) He may, upon affidavits before answer, or upon the answer if it has been filed, present his motion to vacate upon the ground that the essential equities of the complaint have been denied; he may support his motion by oral evidence upon the hearing and his motion may or may not [3] be granted in the sound discretion of the court; but whether granted or not, the parties are in nowise concluded upon the ultimate questions involved. (34 Cyc. 160, 161.) It follows that to hold a technical vacation of the order of appointment prerequisite to the maintenance of an action of this kind, although the rightfulness of the appointment may depend wholly upon the merits of the plaintiff's claim, we must deny application of the statute to cases which it was clearly intended to cover, and strip the statute of the greater part of its meaning. This we have no disposition and no authority to do.

Nor does any controlling reason assert itself for the conclusion that in a case where the rightfulness of the appointment depends upon the merits of the plaintiff's claim, there must be any express adjudication against the propriety of the appointment. It may be, as held in *Ferguson v. Dent*, 46 Fed. 88, that the ultimate defeat of the plaintiff does not always establish the impropriety of the appointment; but one cannot rightfully procure a receiver for property in which he has no interest, and where the very cause of action is a claim to ownership or interest in the property, where the right to a receiver is made to depend upon that, and where the final decree specifically adjudges the ownership of the property to be in the defendant, it seems gratuitous to say that from this a finding against the propriety of the receivership cannot be implied, or, if implied, cannot be sufficient.

Counsel cite *Joslin v. Williams*, 76 Neb. 594, 107 N. W. 837, 112 N. W. 343, as clearly showing "that in order to maintain an action on such a bond, it must first be judicially determined in the manner provided by law in the original action, that the receiver was wrongfully appointed." The *Joslin Case*, and also the case cited therein as the leading authority—*Haverly v. Elliott*, 39 Neb. 201, 57 N. W. 1010—were decided under a statute of Nebraska which exacts of the applicant for a receiver a bond to pay all damages suffered by the adverse party "in case it shall be finally decided that the order ought not to have been granted." If this statute requires an express finding to the effect stated, it is open to the comment above made upon the statute of Alabama. As a matter of fact, the Nebraska court merely recites that it was finally decided that the order ought not to have been granted, without stating how such decision was made nor in what manner it is provided by law that such decision should be made, and the question of the form such decision must take was not involved.

So, too, our own case of *Thornton-Thomas Mercantile Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10, urged as persuasive at least, is no authority for appellant's contention. There the appointment had been vacated by this court upon appeal for insufficiency in the preliminary showing. The procedure adopted was doubtless proper and it may have been necessary in the particular circumstances; but it is nowhere suggested in the opinion that such is the indispensable procedure in every case, nor that it is always necessary to have an express adjudication against the appointment, nor that the final judgment against the plaintiff in the primary case may not carry the conclusion that the appointment was improper.

What the issues were in *Perrine v. Lyon* is fully set forth in the pleadings at bar; from them we learn that Perrine sought the receivership to protect an interest which he claimed in the property as part owner thereof, and which claim Lyon denied, asserting sole ownership in himself. When the court by its judgment determined that Lyon was the owner, it necessarily

found that Perrine had no interest and therefore no sufficient cause for the appointment of a receiver. As between the parties to this action, that judgment was an adjudication, not merely [4] of the conclusions expressed, but of everything necessarily included in them. (Rev. Codes, sec. 7917; *Lokowich v. City of Helena*, 46 Mont. 575, 129 Pac. 1063; *Howell v. Bent*, ante, p. 268, 137 Pac. 49.)

Applying the same principle to the order made in *Perrine v. Lyon* denying the motion to vacate the appointment, it may be conceded that such order was *res judicata* against the respondent; but only so far as it went. Since the only matters involved were the grounds of the motion, and since these did not, and could not, present the rightfulness of the appointment as dependent upon the merits of the case, and since the merits of the case could not be finally determined save at the trial, such adjudication is of no effect upon the matter as now presented. For like reasons, and independently of others which suggest themselves, the contention that the case at bar is a collateral attack upon the order cannot be sustained.

It is suggested, however, that the judgment itself clearly recognizes the validity of the appointment because it does not discharge the receiver, but gives him a lien on the property for his fees, and requires him to make further reports. As to this it is sufficient to say: The judgment commands the receiver to deliver the property to Lyon, and he could not be discharged until this was done and report thereof made to the court; his right to his fees, costs and disbursements did not depend upon the propriety of his appointment (*Hickey v. Parrot S. & C. Co.*, 32 Mont. 143, 108 Am. St. Rep. 510, 79 Pac. 698); he was entitled to have them fixed by the court, and this could not be done without a report; the clause of the judgment giving him a lien on the property [5] indicates nothing save an error against Lyon, of which appellant cannot take advantage in this case.

Some argument is devoted to the proposition that the respondent by acquiescing in the order is estopped to now question its propriety; and in this connection it is said that "Lyon was not

obliged to leave the property in the possession of the receiver": [6] he could, by appealing from the order refusing to vacate the appointment and filing an undertaking, have procured a *superedeas* and thereby suspended the authority of the receiver and withdrawn the possession of the property from him. While the respondent moved to vacate the order appointing the receiver, basing his motion upon procedural grounds, and while his failure to appeal from the order denying that motion may be taken as an acquiescence in the last order and in the receivership, so far as it depended upon the grounds presented by the motion, still such acquiescence cannot be extended beyond the effect of the order itself. As we have held that the order was not an adjudication against the respondent upon the propriety of the receivership, so far as it depended upon the merits, the acquiescence is of no importance.

2. The issues in *Perrine v. Lyon* were whether these parties [7] were partners and whether Perrine owned any interest in the property; and although Perrine did allege the value of the property to be \$4,000, and Lyon did deny that it had any value above \$1,500, the judgment did not find, nor was it necessary to a determination of the issues that it should find, the value of the property. The respondent, therefore, was not barred by the judgment from asserting in this case that the property was of greater value. If he was not barred by the judgment, he was not estopped by the mere pleading of such matter; that amounts at most to the statement or admission of an independent fact, presentable in evidence against him and to be considered by the jury in fixing the amount of his damages. (*Peterson v. Warner*, 6 Kan. App. 298, 50 Pac. 1091; *Thompson v. Currier*, 70 N. H. 259, 47 Atl. 76; *Posey v. Hanson*, 10 App. D. C. 496; *Hall v. McNally*, 23 Utah, 606, 65 Pac. 724.) We see no error in this part of the proceedings.

3. The receiver returned only part of the property to the respondent, claiming that the remainder was lost or destroyed. [8] The truth of this claim is not questioned; it was not contended upon the trial by anyone that such loss was due to any

fault of the receiver, nor does it appear that such loss could not have occurred without his fault; he is therefore presumed to have done his duty. But the loss occurred, and it occurred because of the receivership; this being true, the charge of error in receiving evidence upon the value of the property not returned by the receiver and in submitting that question to the jury as an element of damages is disposed of by the reasoning in *Thornton-Thomas Mercantile Co. v. Bretherton*, cited above.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied April 22, 1914.

IN RE GALLATIN IRRIGATION DISTRICT.

(No. 3,355.)

(Submitted February 9, 1914. Decided March 9, 1914.)

[140 Pac. 92.]

Irrigation District—Creation—Jurisdiction—Petition—Insufficiency—Construction of Act—Discretion—Witnesses—Mileage and Per Diem—Public Lands—Settlers—Taxation.

Irrigation Districts—Liberal Construction of Act, When.

1. After the district court has acquired jurisdiction of the subject matter and the parties to a proceeding instituted under Chapter 146, Laws of 1909, relative to the creation of irrigation districts, by a proper petition filed with the clerk of the court, the provisions of the Act and the rules of procedure must be given the most liberal construction, to the end that the purpose of the statute may be carried into effect.

Same—Petition—Insufficiency—Dismissal.

2. The petition necessary to confer jurisdiction upon the district court to create an irrigation district under Chapter 146, Laws of 1909, must be signed by a majority in number of the land owners in the district who also own more than one-half of the acreage therein; hence where such a petition disclosed on its face that it was not signed by a majority of the land owners in the proposed district, an order dismissing it was proper.

Same—Public Lands—Settlers—Taxation.

3. A settler upon government land has not any taxable interest in it prior to making final proof; therefore, since all land comprised in an

irrigation district created under Chapter 146, Laws of 1909, is subject to an annual levy of taxes for the running expenses of the district, neither homestead nor desert entries may be taken into consideration in passing upon the sufficiency of a petition for the creation of such a district.

[As to exemption from taxation of land owned by governmental bodies or in which they have an interest, see note in 132 Am. St. Rep. 291.]

Same—Petition—Amendment—Discretion.

4. In the exercise of the powers conferred upon the district court in the creation of irrigation districts (Laws 1909, Chapter 146), it may exercise a wide discretion, an abuse of which, in refusing to permit a petition to be amended by the exclusion of lands and the addition of others, must be shown to put the court in error in dismissing the petition on the ground of insufficiency.

Same—Witnesses—Mileage and *Per Diem*.

5. The allowance of mileage and *per diem* to witnesses who were present and ready to testify for the objectors to the creation of an irrigation district and whose testimony would have been relevant, competent and material, was proper, though they were not subpoenaed, sworn or examined because of the dismissal of the petition for insufficiency.

Same.

6. Where a person was not called or examined as a witness, he was not entitled to fees, in the absence of a showing that his testimony could reasonably be offered as relevant, competent or material to the issues raised for trial.

Appeal from District Court, Gallatin County; Albert P. Stark, Judge of the Sixth Judicial District, presiding.

PETITION for the creation of an irrigation district. From an order dismissing the petition for insufficiency, petitioners appeal. Modified and affirmed.

Messrs. Hartman & Hartman and Mr. H. D. Kremer, for Appellants, submitted a brief; Mr. Walter Hartman argued the cause orally.

We are aware that it is settled in this state that the fees of a witness attending at the request of the party and testifying, together with his mileage, may be taxed by the party calling him against the unsuccessful party. (*McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428; *Great Falls Meat Co. v. Jenkins*, 33 Mont. 417, 84 Pac. 74; *Neary v. Northern Pacific Ry. Co.*, 41 Mont. 480, 110 Pac. 226.) The question as to whether the fees of witnesses who have neither been subpoenaed nor examined can be taxed has not been determined in this state, but it would seem that the party claiming to tax such fees ought at least to have

the burden of proof showing that the witnesses were material; that they attended in good faith upon his request made in good faith and that the taxation of the costs is not merely attempted to unjustly annoy his adversary. Some of the courts have held that fees of witnesses attending but not subpoenaed or sworn or examined cannot be taxed as costs against the losing party, and particularly where the circumstances will not show the utmost good faith upon the parties seeking to recover their costs. (*Fisher v. Burlington etc. Ry. Co.*, 104 Iowa, 588, 73 N. W. 1070; *Mylius v. St. Louis etc. Ry. Co.*, 31 Kan. 232, 1 Pac. 619; *Sapp v. King*, 66 Tex. 570, 1 S. W. 466.) And it has been held where a large number of witnesses have been summoned and not examined the presumption arises that they are unnecessary and their costs should not be allowed unless that presumption is overthrown. (*Dean v. Williams*, 6 Hill (N. Y.), 376; *Haynes v. Mosher*, 15 How. Pr. (N. Y.) 216.) And it is again held that under such circumstances the taxation of the costs of such witnesses as are objected to demands a showing by the party summoning them that the witnesses were or might have been material, or affidavits stating facts showing the necessity of having them in attendance. (*Osborne v. Gray*, 32 Minn. 53, 19 N. W. 81; *Meagher v. Van Zandt*, 18 Nev. 230, 2 Pac. 57; *Lillienthal v. Southern California R. Co.*, 61 Fed. 622; *Haines v. McLaughlin*, 29 Fed. 70.)

Mr. John T. Smith & Son and *Mr. Ike E. O. Pace*, for Respondents, submitted a brief; *Mr. John T. Smith* and *Mr. Pace* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On January 27, 1913, there was filed with the clerk of the district court of Gallatin county a petition for the creation of an irrigation district under the provisions of Chapter 146, Laws of 1909.

The petition suggests a name for the proposed district; describes by government subdivisions all lands sought to be in-

cluded; gives the names of all holders of title or evidence of title and the postoffice addresses of all who are nonresidents; describes the source of intended water supply and the means of irrigation, and concludes with a prayer for appropriate relief. A map showing the proposed district and irrigation system accompanied the petition and a sufficient bond, duly approved, was furnished. An order was made fixing a time and place for hearing; the statutory notice was given and proof of service made. Before the hearing a protest in writing on behalf of twenty-seven of the owners named in the petition, and eight others was filed, objecting to the petition and to the organization of the district upon some twelve grounds, among which are: That certain petitioners are not the owners or holders of title or evidence of title to any lands in the proposed district; and that "a majority in number of the holders of title or evidence of title to lands susceptible of irrigation from the same alleged general source and by the same general system of works, have not signed the petition herein, nor proposed the establishment and organization of said system."

At the hearing counsel for the petitioners moved to amend by adding to the petition the names of three other qualified petitioners and the description of certain land. The motion was denied *pro forma* with leave to renew it, but counsel did not avail themselves of the privilege extended. The petitioners also moved to further amend by striking from the petition the names of Nancy L. Woodward, executrix, and "Garnett Bros.," and the descriptions of all lands accredited to these parties in the petition. This motion was denied—the court assigning as its reason that "it appears upon the face of the petition that these persons are the owners of lands susceptible of irrigation from the same general source, and included within the boundaries of the proposed district." The court then proceeded to ascertain whether the petition was in fact signed by a majority of the holders of title or evidence of title to the lands described therein, and upon such hearing it was made to appear that two of the signers are homestead entrymen, and a third is a desert entry-

man, no one of whom has made final proof; that "Garnett Bros." consists of J. E. (or Edwin) Garnett, Frank Garnett and Addie Garnett, and that Nancy L. Woodward is the executrix of the last will of A. J. Woodward, deceased; that the estate is in process of administration in the district court of Gallatin county; that the heirs at law of A. J. Woodward are Nancy L., the surviving widow, and seven children; that certain lands are entered upon the assessment-roll to "Garnett Bros.," but the records indicate that the ownership is in the three Garnetts named; that portions of the Woodward lands are assessed to "A. J. Woodward," and the records of the state land office disclose that they were purchased from the state by "Nancy L. Woodward, Admr." Upon this showing the district court entered an order dismissing the petition at the cost of the petitioners. The appeal is from that order.

The avowed purpose of Chapter 146 above is to provide for the creation, organization and management of irrigation districts. When one of these districts is created it becomes a public corporation with certain enumerated powers, among which are to procure an irrigation system by purchase or construction, and to pay for the same and for the upkeep or running expenses. The management is vested in a board of three commissioners appointed for their initial term by the court, and elected thereafter annually by the land owners of the district who are qualified electors under the Act. Upon this board are conferred very extensive powers. The members are allowed compensation for their services, are permitted to employ clerical help, engineers, common laborers and others, at the expense of the district; to incur indebtedness, to purchase property, *etc.* The apparent theory of the statute is the naked right of the majority to rule. It requires a majority of the land owners (using the terms "land owners" herein to indicate the holders of title or evidence of title) who also own a majority of the acreage, to initiate the movement for the creation of one of these districts, but a bare majority may succeed in having a district created over the protest and objection of the minority. While there is an initial

limit of \$10,000 placed upon the power of the board to incur indebtedness for a water system and to charge the district therefor, the written consent of a bare majority of the land owners who own a majority of the acres in the district removes that limitation. Under the Act as it stood at the time this proceeding was instituted, the board could incur an indebtedness against the district to the extent of \$5,000 in any one year. Under the amendment made to section 38 by the legislature in 1913, a much wider latitude is allowed. Section 19 prescribes the qualifications of district voters. Neither the nonresident land owner nor the resident land owner who does not possess the qualifications of an elector at our general state or school elections has any voice whatever in the management or control of a district after it is organized.

These observations upon the general character of the legislation are made to indicate the extent to which all the proceedings as against a minority land owner are *in invitum*, and the extent to which the minority member is at the mercy of the majority. His property may be encumbered against his will and he may be compelled to respond for debts which he never contracted or authorized.

The proceeding is somewhat analogous to that invoked in creating special improvement districts in cities and towns. The power to create one of these districts and certain supervisory control over its affairs after it is created are lodged with the district [1] court. But the court must acquire jurisdiction of the subject matter and of the parties before it can order a district created and the Act provides just how such jurisdiction shall be obtained. When once the subject matter and the parties are before the court, then the provisions of the Act and the rules of procedure are to be given most liberal construction, to the end that the purpose of the Act may be carried into effect. Jurisdiction over the subject matter is acquired when a proper petition is filed with the clerk of the district court. In order to be of any avail—in order to set the machinery of the law in motion, [2] such petition must be signed by a majority in number of

the land owners who also own more than half of the acreage in the proposed district. For the purpose of determining whether a petition meets these requirements, the court is authorized by section 4 to take testimony if necessary. A domestic corporation is treated as an individual, and a guardian, executor, administrator or trustee residing in this state is authorized to act for his ward, estate or beneficiary, as the case may be, so far as exercising the voting power is concerned. (Section 19.) In the instant case the petition names sixty-one individual or corporate owners, and in addition thereto names Nancy L. Woodward, executrix of the last will of A. J. Woodward, deceased, and "Garnett Bros." as owners. The petition is signed by thirty-two, not including either Mrs. Woodward or Garnett Brothers.

The fact that Nancy L. Woodward is executrix of the last will of A. J. Woodward, deceased, of itself means nothing. We are not advised as to the provisions of the will or whether Mrs. Woodward is sole devisee of this particular land, but it is unnecessary to determine whether "Nancy L. Woodward, Executrix," should be counted as one land owner, for the result would not be affected. While an individual might conduct his business under the name "Garnett Brothers," we think those terms imply, *prima facie*, more than one person. This must be so if any attention whatever is paid to the ordinary usage of common English words. The word "brothers" is the plural of "brother" and means more than one. Counting Garnett Brothers as two persons, at least, and the petition on its face discloses that it fails to meet the requirements of sections 1 and 2 of the Act. There are at least sixty-four land owners in this district and the petition was signed by only thirty-two, which is not a majority. When the court heard evidence, the deficiencies of the petition were made all the more apparent. Garnett Brothers are three persons, while of the thirty-two who signed, three are clearly not qualified [3] signers under the Act. Neither a homestead nor desert entryman has any title or evidence of title to the land held by him, prior to the time he makes final proof. It is not even necessary to consider the effect of the lien of a bond issue upon the lands

held by these three. to determine that the Act never contemplated that government lands are to be included in one of these districts. The ordinary overhead or running expenses of a district are to be met by an annual levy of taxes (section 49) imposed upon all lands therein, "except such lands as have been included within such district on account of the exchange or substitution of water." (Section 48.) That a settler upon government lands does not have a taxable interest in the land prior to making final proof has been the universal holding, or practically so, of all the authorities. If we deduct the names of the homestead and desert entrymen, the petition has but twenty-nine qualified signers as against a total of sixty-five at least.

Doubtless, if the trial court had felt certain that the petition was *prima facie* sufficient, it would have permitted it to be amended by the addition of the names of the three other qualified petitioners; but when it appeared that three of the original petitioners were not qualified to sign, the addition of three other names would not have rendered the petition sufficient. As we said above, after it is shown that the court has jurisdiction, the most liberal rules of procedure should be applied; but in the face of a showing that jurisdiction had not been acquired in the first instance, the court cannot be put in error for failing to do what it had no power to do, or what would have been useless.

Section 4 contemplates that the court may exclude lands from [4] the proposed district, but certainly the most that can be said of the action of the court, upon petitioners' request to exclude the Woodward and Garnett lands is, that it exercised its discretion against permitting the amendment and in the absence of any showing of abuse of such discretion, and in the presence of petitioners' own showing that those lands lie within the proposed district and are susceptible of irrigation from the same general source and by the same general system as the other lands mentioned, the order cannot be disturbed. A very wide discretion appears to be lodged in the district court and rightfully so, if the Act is to be made workable. This procedure is purely statutory. The Act prescribes in detail the steps necessary to be

taken to clothe the district court with authority to act, and these statutory requirements must be fully met before the court can proceed. When it thus appeared that the petition was not sufficient to give the court jurisdiction, the order of dismissal was the only one which the court could make.

Upon the entry of the order, the objectors filed a memorandum [5] of costs, including therein mileage and *per diem* for fourteen witnesses and *per diem* for two others, amounting in all to \$284. A motion to tax and to strike out every one of these items was made and overruled, and error is assigned. Appellants object to the allowance of any fees to these witnesses because they were not subpoenaed, sworn or examined. An affidavit by counsel for the objectors was filed, setting forth generally that the witnesses were present to testify (1) that the petitioner's plan for irrigating the lands in the proposed district is impractical; (2) that there is not sufficient surplus or flood water at the intended source of supply to fill the proposed reservoir or to irrigate the lands in the proposed district; and (3) that all of the lands in the district produce crops without artificial irrigation, and the increased yield would not compensate for the added expense. Section 3 of the Act provides for notice of a hearing upon the petition for the creation of a district, and section 4 declares: "Upon such hearing all persons interested whose lands or rights may be damaged or benefited by the organization of the district or the irrigation works or improvements therein or to be acquired or constructed as hereinafter set forth, may appear and contest the *necessity or utility* of the proposed district, or any part thereof, and the contestants and petitioners may offer any competent evidence in regard thereto." If, then, the questions of the necessity and utility of the proposed district were properly before the court for determination, it seems clear that the evidence which these witnesses were called to give was relevant, competent and material. Appellants cannot complain that they were not subjected to additional expense for the service of subpoenas upon these witnesses; and neither are they in a position to urge that the witnesses were unnecessary because the petition

was insufficient. The objectors were required to be prepared to contest the petition upon its merits if the trial court ruled against them upon the preliminary objections to its sufficiency.

No explanation is offered for the presence of the witness Thomas Copenholt. One party to the controversy cannot mulct [6] his adversary for the expense of a witness who was not called or examined, in the absence of some showing that the testimony which he was expected to give could reasonably be offered as relevant, competent or material to the issues raised for trial. The item of \$12 charged for that witness should have been eliminated.

The cause is remanded to the district court with direction to strike from the cost bill the item of \$12 charged for the witness Thomas Copenholt, and with this modification the order of the district court will stand affirmed.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied April 21, 1914.

STATE EX REL. CITY OF BUTTE, RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,413.)

(Submitted February 13, 1914. Decided March 16, 1914.)

[139 Pac. 791.]

Cities and Towns—Streets—Changing Grades—Damage to Property—Board of Appraisers—Appeal to District Court—Jurisdiction—Prohibition.

Cities and Towns—Streets—Changing Grades—Board of Appraisers—Appeal to District Court—Jurisdiction.

1. *Held*, on application for writ of prohibition, that the operation of sections 3441-3446, Revised Codes, providing, *inter alia*, for a board of appraisers to report the damages accruing to a property owner because of the contemplated grading of a street, for an appeal from

their award, etc., is restricted to cases where an established grade is about to be changed to a new and different one to the damage of the owner who has erected a building with reference to the grade as established, and that therefore the district court was without jurisdiction to entertain an appeal from an award of such a board where the damages complained of were the result of a change in the street from contour to established grade.

Same—Injury to Property—Compensation—Constitution.

2. The right to compensation for damages to property occasioned by the grading of a street from contour to established grade is guaranteed by section 14, Article III, Constitution, declaring that just compensation must be made where private property is taken or damaged for public use.

[As to right of abutting owner to compensation for changing grade of street, see notes in 4 Am. St. Rep. 401; 43 Am. Dec. 723.]

Same—Appointment of Appraisers—When Improper.

3. To warrant the appointment of a board of appraisers to assess the damages accruing to abutting property by reason of a change in the established grade of a street, it must, under section 3442, Revised Codes, appear that the city and the owner are unable to agree upon the amount of damages.

Original application by the state, on relation of the City of Butte, for writ of prohibition forbidding the District Court in and for Silver Bow County, and Hon. Jeremiah J. Lynch, a judge thereof, from further entertaining jurisdiction of proceedings for the assessment of damages to a property owner resulting from the grading of a street. Writ granted.

Messrs. Alexander Mackel, Wm. F. Davis, and N. A. Roterling, for Relator, submitted a brief; *Mr. Roterling* argued the cause orally.

Mr. E. B. Howell, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Such of the facts as we deem pertinent to the decision of this case are as follows: An ordinance of the city of Butte was passed and approved in January, 1913, establishing for the first time the grade of Emmett, Diamond, and other streets, and on March 5, 1913, a resolution was passed creating special improvement district No. 137 for the purpose, among others, of bringing these streets to the grade thus established. A contract for this work was let in April, and sometime before June 12, 1913, three per-

sons were appointed as a board to appraise such damages as might accrue from the grading operations to the owners of property who had not signed written waivers. One of such owners was William Thomas. The report of this board was thereafter filed, and by it the damages to accrue to the property of Mr. Thomas were assessed, and he, being dissatisfied therewith, on July 7, 1913, filed his notice of appeal to the district court therefrom. The city by special appearance moved to dismiss the appeal upon the ground that the district court had acquired no jurisdiction of the parties or cause, which motion was by the court denied. Whereupon, on affidavits filed herein, reciting the foregoing and other facts, an alternative writ was issued out of this court, forbidding further proceedings by the district court pending the action of this court, and to this writ a motion to quash has been addressed.

The jurisdiction of the district court is assailed on a number of grounds, and a consideration of them all together, with the matters urged in resistance of them, would lead us very far afield. There stands, however, at the very threshold of the proceeding an obstacle so formidable that all the other questions raised become purely academic.

The cause came before the district court as an appeal from the [1] report of the appraisers under the provisions of sections 3441-3446, Revised Codes, and it does not fall within these provisions, according to the facts admitted of record. The operation of these sections, so far as it has to do with the appointment of appraisers, with an appraisal by them and with an appeal therefrom, is by section 3441 expressly restricted to those cases where a grade has been established by the corporate authority of the city or town, where a building has been erected with reference to such grade, where the grade is afterward changed, and where such change entails the raising or lowering of the building, to the damage of the owner. It is alleged by the relator, and admitted by the motion to quash, that there had been no change of established grade, but that the grading in question was to make the streets conform to the grade established; that whatever

change was made or contemplated was not from one established grade to another, but from contour to grade. It is undoubtedly [2] true that the right of the owner of property to redress for damages, in such a case as the facts here disclose, is guaranteed by the Constitution (Article III, sec. 14; *Less v. City of Butte*, 28 Mont. 27, 98 Am. St. Rep. 545, 61 L. R. A. 601, 72 Pac. 140), and the sections above referred to are an attempt to prescribe and to circumscribe the methods by which such redress may be obtained under certain circumstances. Such a statute is not to be construed to cover conditions to which it does not specifically refer; but as to all matters not within its provisions, the owner is left to pursue the general methods established by law for the assertion of rights and the redress of wrongs.

Moreover, when all the circumstances detailed in section 3441 [3] exist, the power of the city to appoint a board of appraisers and clothe it with any authority is made further to depend upon the inability of the city and the owner to agree. (Sec. 3442.) This, of course, implies some effort, and it does not appear that before the board was appointed any effort to agree was made by the city and Mr. Thomas, or that they were in fact unable to agree.

We must therefore hold that the board from whose action the appeal in question was attempted never had any legal existence, nor its report any binding authority; hence there was nothing to appeal from, and the district court is without jurisdiction.

A peremptory writ is directed to issue forthwith.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 3,374.—STATE *EX REL.* ISABEL DOLENTY, RELATRIX,
v. DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of mandate against the district court in and for Broadwater County, and Hon. Ben B. Law, Judge presiding.

Decided September 2, 1913.

PER CURIAM.—The petition of relatrix for a writ of mandate herein, having this day been presented to the court, it is after due deliberation ordered that a peremptory writ issue, directing the court below to issue a writ of possession or make such orders as may be necessary to enforce its decree in the suit of *Henry J. Reed et al., Plaintiffs, v. Isabel Dolenty, Executrix, Defendant*, rendered in favor of said defendant.

Messrs. Wight & Pew, for Relatrix.

No. 3,359.—PETER STRAUD, RESPONDENT, *v.* CHICAGO, BURLINGTON & Q. RY. CO., APPELLANT.

'Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Decided September 15, 1903.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby dismissed, in accordance with stipulation of counsel on file herein.

Messrs. E. T. Clark and O. F. Goddard, for Appellant.

Mr. Thad. S. Smith, for Respondent.

No. 3,299.—ELENOR RYAN, RESPONDENT, v. NORTHERN PACIFIC RY. CO., APPELLANT.

Appeal from District Court, Park County; J. Miller Smith, a Judge of the First Judicial District, presiding.

Decided September 20, 1913.

PER CURIAM.—Upon motion of counsel for appellant herein, it is ordered that the appeal in this cause be and the same is hereby dismissed.

Messrs. Gunn & Rasch, for Appellant.

No. 3,387.—J. T. WILLIAMS, APPELLANT, v. J. C. ORRICK, RESPONDENT.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Decided November 10, 1913.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby dismissed without prejudice, in accordance with motion of appellant on file herein.

Mr. Thomas C. Marshall, for Appellant.

No. 3,400.—P. B. MILLER, RESPONDENT, *v.* NORTHERN
PACIFIC RY. CO. ET AL., APPELLANTS.

*Appeal from District Court, Missoula County; Asa L. Duncan,
Judge.*

Decided November 28, 1913.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be dismissed in accordance with stipulation of counsel on file herein.

*Messrs. Gunn & Rasch, and Mr. Wm. F. Wayne, for Appel-
lants.*

Messrs. Tolan & Gaines, for Respondent.

No. 3,391.—STATE EX REL. JOS. M. PYLES, RESPONDENT, *v.*
ROBT. J. BRENNAN, APPELLANT.

*Appeal from District Court, Musselshell County; Chas. L.
Crum, Judge.*

Decided December 3, 1913.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with stipulation of counsel on file herein.

Messrs. Boarman & Boarman, for Appellant.

Mr. Thos. J. Mathews, for Respondent.

No. 3,416.—AL. BENOIT, RESPONDENT, *v.* WALTER T. GUTZ,
APPELLANT.

Appeal from District Court, Sanders County.

Decided December 15, 1913.

PER CURIAM.—Respondent's motion to dismiss the appeal herein was this day submitted, and the court after due consideration ordered the appeal dismissed in accordance with said motion.

Mr. Walter T. Gutz, and Mr. H. J. Burleigh, for Appellant.

Mr. I. R. Blaisdell, for Respondent.

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ABANDONMENT.

See Mines and Mining, 5, 6.

ACCESSORIES.

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At law, between partners,—see Partnership, 1.

Under special statutes—Complaint,—see Pleading and Practice, 21.

Joint and Several Causes of Action—Variance.

1. Under the rule that neither in actions *ex contractu* nor in actions *ex delicto* can the plea of an obligation to the plaintiff individually be sustained by proof of an obligation running to himself and others jointly, *held*, in an action by a cattle owner against a railroad company based upon a complaint counting on the failure of the carrier to supply cars on a given day for the shipment of plaintiff's cattle, that there was a fatal variance between his pleading and the evidence, which showed that the obligation to furnish cars ran to a combination of cattle owners, of which plaintiff was one, and not to him individually. *American L. & L. Co. v. Great Northern Ry. Co.*, 495.

Same.

2. An obligation running to a combination of persons jointly could not be changed into one actionable by any member of it, by the fact that defendant's agent knew from previous transactions that plaintiff was a member of the combination, and that failure to perform would result in damage to the latter.—*American L. & L. Co. v. Great Northern Ry. Co.*, 495.

Issues—Determinable as of What Date.

3. All issues must be determined as of the date of the commencement of the action.—*Scott v. Waggoner*, 536.

ADMISSIONS.

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APPEAL AND ERROR.

See, also, Harmless Error.

Notice and undertaking on appeal from justices' courts,—see Justices of the Peace, 3-6.

Probate Proceedings—Nonappealable Orders.

1. An order requiring a person charged by an administrator with having concealed or disposed of assets of the estate represented by the latter, made after examination of the former pursuant to a citation issued in a proceeding instituted under sections 7505 and 7506, Revised Codes, to make disclosure as prayed, is not appealable.—*In re Roberts' Estate*, 40.

New Trial Order—Discretion—Review.

2. *Quære*: Must the ruling of a district judge, called in to pass upon a motion for new trial, be tested by the same standards of discretion as would be applied to that of the judge who tried the case if he had ruled thereon?—*Leveridge v. Hennessy*, 58.

Same—Affirmance, When.

3. An order granting a new trial which does not indicate upon which of several grounds assigned it was based, will be affirmed if justifiable upon any one of them.—*O'Hanlon v. Ruby Gulch Min. Co.*, 65.

Trial—Theory of Case—Conclusiveness.

4. Where defendant made no objection to the trial of a cause as one to quiet title to a mining claim under section 6870, Revised Codes, he will not be heard on appeal to insist that it should have been tried as an adverse suit under section 2326, United States Revised Statutes.—*O'Hanlon v. Ruby Gulch Min. Co.*, 65.

Briefs—Assignments of Error—Waiver.

5. Assignments of error not argued in appellant's brief will be treated as waived.—*Frank v. Butte & Boulder M. & L. Co.*, 83.

Motion to Strike Testimony—When Refusal not Error.

6. Refusal of motion to strike all of certain testimony, parts of which only were inadmissible, was not error.—*Westlake v. Keating Gold Min. Co.*, 120.

Pleading and Proof—Variance—Waiver.

7. Where an action was tried in the district court on the theory that the pleadings were sufficient to admit certain proof for the purpose for which it was offered, the losing party will not be heard to assert on appeal for the first time that there was a fatal variance.—*Mosher v. Sutton's New Theater Co.*, 137.

Conflicting Evidence—Verdict Conclusive.

8. Where the verdict of the jury is based on conflicting evidence, it is conclusive on appeal.—*Western Min. Supply Co. v. Melzner*, 174; *Lizott v. Big Blackfoot M. Co.*, 171.

Briefs—Argument—Assignments of Error—Waiver.

9. An assignment of error based upon an instruction given, the only argument devoted to which in appellant's brief is contained in the words: "As to this instruction we think that this error is the breach of an elementary proposition of law," will be deemed waived for lack of proper argument in support thereof.—*Western M. Supply Co. v. Melzner*, 174.

Contracts—Measure of Damages—Failure to Instruct—Reversible Error.

10. Failure to instruct the jury as to the measure of damages recoverable in an action on a contract is reversible error.—*McFarland v. Welch*, 196.

Evidence—Technical Error—Effect.

11. For merely technical error in the admission and exclusion of evidence which did not result in prejudice to appellant, a judgment will not be reversed.—*De Sandro v. Missoula L. & W. Co.*, 226.

Appeal—Correct Judgment—Affirmance Notwithstanding Error.

12. Where plaintiff was not entitled to judgment in any view of the case as tried, it will not be reversed for error committed during trial.—*Howell v. Bent*, 268.

Equity Cases—Transcript—Evidence—Rules.

13. Disregard of subdivision 3 of supreme court Rule VIII, requiring that in equity cases where questions of fact are presented for review, the testimony relating thereto must appear in the transcript by question and answer, lays the appeal open to dismissal.—*Gilmore v. Ostro-nich*, 305.

Theory of Case—Conclusiveness.

14. Under the rule that a party will be held bound on appeal by the position assumed by him in the trial of his case in the district court, where an action concerning dealings between former partners, brought after settlement of the partnership affairs, was tried as one at law, with the apparent consent of appellant, he was not in a position to assert that it should be reviewed as a suit in equity for an accounting.—*Goldsmith, Exr., v. Murray*, 337.

Appeal—Conflicting Evidence—Judgment—Affirmance.

15. In an action at law tried by the court without a jury, the evidence introduced in which was conflicting, it was the exclusive privilege of the trial judge to determine the credibility of the witnesses, and its finding, reviewed on motion for new trial and attacked for insufficiency of the evidence to support it, must be accepted as final on appeal.—*Goldsmith, Exr., v. Murray*, 337.

Notice of Appeal—Sufficiency.

16. A notice of appeal which, though informal and indefinite in the extreme, must have apprised defendant that plaintiff's purpose was to appeal from a judgment entered on a given date in favor of the former and against the latter, *held* proof against dismissal on the ground of insufficiency.—*Stephens v. Conley*, 352.

Appeal—Correct Result—Wrong Reason—Affirmance.

17. If a decision of the trial court is correct, though based upon an erroneous reason, it will not be disturbed on appeal.—*Stephens v. Conley*, 352; *Canning v. Fried*, 560.

Review—Scope.

18. On appeal from a judgment erroneously dismissing an action on the ground that the complaint did not state a cause of action, the defects in which pleading were cured by the answer, the supreme court is not concluded from ordering a new trial because of appellant's failure to call the trial court's attention to the curative effect of the answer.—*Stephens v. Conley*, 352.

Maps—Record on Appeal.

19. Where a map or plat is used on the trial in the district court, it should be incorporated in the record on appeal, with proper references fixing the points adverted to by the witnesses, to the end that the evidence touching it may be intelligible to the appellate court.—*Kaufman v. City of Butte*, 400.

Injunction Order—Burden of Showing Error.

20. On appeal from an injunction order, the appellant has the burden of showing that the evidence preponderates against the trial court's findings.—*Kaufman v. City of Bama*, 451.

New Trial Order—Affirmance, When.

21. Where an order granting a new trial is general in terms, it will be affirmed if it may be justified upon any of the grounds assigned in the notice of intention to move for a new trial, regardless of the reasons given by the court for its ruling.—*O'Hallen v. Ruby Gulch Mtn. Co.*, 65; *Wallace v. Chicago, M. & P. S. Ry. Co.*, 427; *Scott v. Waggener*, 528.

Findings—Evidence—Sufficiency—Review—Bill of Exceptions.

21a. The sufficiency of the evidence to justify findings in a water right suit may be raised on motion for a new trial and reviewed on appeal without formal exceptions, the law (Rev. Codes, sec. 6794) reserving an exception for that purpose; hence a formal bill of exceptions was not required.—*Conrow v. Haffner*, 437.

Presumption of Correctness of Judgment.

22. On appeal the presumption obtains that the trial court did not commit error, and the burden of overcoming that presumption rests upon appellant.—*Ringling v. Smith River Development Co.*, 467.

Special Order After Final Judgment—Appealable Order—Review.

23. An order refusing to set aside a judgment is a special one made after final judgment and appealable as such (Rev. Codes, sec. 7098); hence it may not be reviewed on appeal from a new trial order.—*Canning v. Fried*, 560.

Default Judgment—Vacation—Appeal from Order—Record—Insufficiency.

24. On appeal from an order setting aside a default judgment, the papers actually used as the basis of the order must be embodied in a bill of exceptions certified by the trial judge, copies certified by the clerk or attorneys being insufficient.—*Smith v. Kirk*, 489.

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25. In the absence of a copy of the notice of intention to move for a new trial, the merits of the motion may not be passed upon.—*Canning v. Fried*, 560.

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26. Of an error against respondent, appellant may not complain.—*Lyon v. United States F. & G. Co.*, 591.

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Time for Settlement—Unlawful Extension of Time.

1. Under section 7190, Revised Codes, the time for presenting a bill of exceptions for settlement may not be extended for a period of time exceeding ninety days without the consent of the adverse party; hence objection to the settlement of a bill on the ground that it came too late should have been sustained, where an extension of time in excess of that above mentioned was granted without the adversary's consent. *Canning v. Fried*, 560.

Default—Relief from—Showing Required.

2. Ignorance of the law as declared in section 7190, referred to in paragraph 1, *supra*, does not constitute an excuse within the meaning of section 6589, Revised Codes, authorizing the district court to relieve a party of his default upon a showing of mistake, inadvertence, excusable neglect, *etc.*—assuming the latter section to be applicable to the default of a party in failing to present his bill of exceptions in time for settlement.—*Canning v. Fried*, 560.

Same—Discretion—Must be Put in Motion.

3. The rule that if, upon a motion to set aside a default, the showing made leaves the court in doubt, it should be resolved in favor of the motion, presupposes that a proper showing has been made; in the absence of a showing, the court's discretion is not set in motion.—*Canning v. Fried*, 560.

Untimely Presentation—Practice.

4. Where a bill of exceptions is presented too late for settlement, it should be settled, after incorporation of the adverse party's objections, and the motion for new trial denied, or the court may refuse to settle the bill because presented too late.—*Canning v. Fried*, 560.

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Personal injuries on streets,—see Personal Injuries, 64–66.

Streets and Alleys—Prescription—Burden of Proof.

1. Defendant city, asserting title to real property by reason of a right acquired through adverse use, had the burden of establishing, by direct or circumstantial evidence, every element necessary to constitute its alleged claim, one of which elements was the fixing of a definite date at which the statute of limitations began to run.—*Barnard Realty Co. v. City of Butte*, 102.

Same—Adverse Use—Evidence.

2. Where the only evidence tending to show the date at which defendant city assumed to exercise control over land, title to which it asserted under the doctrine of prescription, by the construction of a ditch thereon, was to the effect that the work had been done in June or July of a certain year and that it required two or three days to complete it, the only rational conclusion deducible therefrom was that it was not done until the last two or three days of July; *held*, therefore, that the statute was not put in motion until July 28 of that year.—*Barnard Realty Co. v. City of Butte*, 102.

Same—Adverse Use—Insufficiency.

3. Under section 1340, Revised Codes (sec. 2603, Pol. Code, 1895), the mere use of land by the public as a street for the statutory period, not coupled with an assumption of jurisdiction over it by the city authorities, was insufficient to clothe the city with title by prescription. *Barnard Realty Co. v. City of Butte*, 102.

Same—Control—Statutes.

4. *Held*, that though sections 1337 and 1340, Revised Codes, are parts of an Act relating in terms to county roads (Laws 1903, Chap. 44), the legislature in providing in the former that not only roads, but also streets, alleys, *etc.*, should be deemed public highways, and in the latter that no highway as thus defined should be vacated otherwise than as provided therein, and no route of travel should thereafter become a highway by mere use not coupled with a declaration to that effect by the county commissioners, impliedly ordained that use of a strip of land within the limits of a city or town for street or alley purposes, should not be deemed adverse until assumption of jurisdiction over it by the city authorities; *held*, further, that by naming, in the latter section, the board of county commissioners only as the agency through which roads, streets, *etc.*, may be established or vacated, it was not intended to invest the board with, and deprive the city authorities of, control over streets, alleys, *etc.* (See, also, opinion on motion for rehearing.)—*Barnard Realty Co. v. City of Butte*, 102.

Aldermen—Eligibility—Residence—Statutory Construction.

5. *Held*, that the provisions of section 3228, Revised Codes, to the effect that no person shall be eligible to any elective or appointive municipal office who has not resided in the city or town for at least two years immediately preceding his election or appointment, applies to officers (aldermen in the instant case) elected at the first election after the incorporation of a town.—*Brown v. Foster*, 114.

Injunction—Properly Denied, When.

6. Equitable relief by way of injunction to prevent the removal of a frame structure valued at \$200 from ground claimed by defendant city as a portion of one of its streets, and to which ground plaintiff had no title whatever, was properly denied, since an action at law would afford plaintiff complete relief by way of damages.—*Kaufman v. City of Butte*, 400.

Streets—Common-law Dedication—Pleadings—Sufficiency.

7. An answer alleging that land in controversy had been for more than ten years regularly laid out, dedicated, and used as a public thoroughfare or street of the city was sufficient to admit proof of a common-law dedication.—*Kaufman v. City of Butte*, 400.

Same—Common-law Dedication—Elements Constituting.

8. The essential elements of a common-law dedication of land for street purposes are the owner's offer evidencing his intention to dedicate, and an acceptance by the public.—*Kaufman v. City of Butte*, 400.

Same—Offer—Sufficiency.

9. The filing of a plat on which an avenue was shown by name, though insufficient to meet the requirements of the statute in that regard, was a sufficient offer to the public of the ground under a common-law dedication, and, in the absence of evidence to the contrary, indicated the intention of the owners to dedicate the ground to the public for a highway.—*Kaufman v. City of Butte*, 400.

Same—Acceptance by Public—Evidence—Sufficiency.

10. Evidence *held* sufficient to show such user of a strip of ground as a street by that part of the general public having occasion to use it, as to constitute an acceptance of it by the public as a street under a common-law dedication.—*Kaufman v. City of Butte*, 400.

Same—Acceptance—Reasonable Time.

11. The acceptance of a common-law dedication must occur within a reasonable time after the offer.—*Kaufman v. City of Butte*, 400.

Same—Negligence of Officers—Estoppel.

12. The right of a city to the use of a strip of ground as a street dedicated for that purpose cannot be defeated by the negligent or wrongful failure of its officers to prevent the use of a portion of it as a building site.—*Kaufman v. City of Butte*, 400.

Streets—Changing Grades—Board of Appraisers—Appeal to District Court—Jurisdiction.

13. *Held*, on application for writ of prohibition, that the operation of sections 3441-3446, Revised Codes, providing, *inter alia*, for a board of appraisers to report the damages accruing to a property owner because of the contemplated grading of a street, for an appeal from their award, etc., is restricted to cases where an established grade is about to be changed to a new and different one to the damage of the owner who has erected a building with reference to the grade as established, and that therefore the district court was without jurisdiction to entertain an appeal from an award of such a board where the damages complained of were the result of a change in the street from contour to established grade.—*State ex rel. City of Butte v. District Court*, 614.

Same—Injury to Property—Compensation—Constitution.

14. The right to compensation for damages to property occasioned by the grading of a street from contour to established grade is guaranteed by section 14, Article III, Constitution, declaring that just compensation must be made where private property is taken or damaged for public use.—*State ex rel. City of Butte v. District Court*, 614.

Same—Appointment of Appraisers—When Improper.

15. To warrant the appointment of a board of appraisers to assess the damages accruing to abutting property by reason of a change in the established grade of a street, it must, under section 3442, Revised Codes, appear that the city and the owner are unable to agree upon the amount of damages.—*State ex rel. City of Butte v. District Court*, 614.

CLAIM AND DELIVERY.

See, also, Evidence, 10-14; Instructions, 7.

Verdict—When Insufficient.

1. A verdict in claim and delivery which does not respond to all the material issues tried is insufficient to sustain a judgment.—*Coerth v. Arbogast*, 209.

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See, also, "White Slave" Act.

Nature of Instrument.

1. The state Constitution is a limitation upon legislative action, and not a grant of power.—*Northern Pac. Ry. Co. v. Mjelde*, 287; *State ex rel. Hillis v. Sullivan*, 320.

Taxation—Revenue—Construction.

2. Since the subject dealt with in section 3, Article XII of the Constitution, was revenue, any doubt as to the sense in which any term therein found was used by the framers of that instrument must be resolved in favor of a definition under which public revenue will be raised, rather than one which will defeat such purpose.—*Northern Pac. Ry. Co. v. Mjelde*, 287.

Legislative Construction—Effect.

3. A construction for many years placed upon a constitutional provision by the legislature in enacting statutes is entitled to respectful consideration by courts.—*Northern Pac. Ry. Co. v. Mjelde*, 287.

Rules of Construction.

4. The state Constitution must be construed in the light of the history of the commonwealth, the surrounding circumstances, the subject matter under consideration, the object sought to be attained, as well as the system of laws in being at the time of its adoption and continued in force by Schedule 1 thereof.—*State ex rel. Hillis v. Sullivan*, 320.

Departments of Government—Powers.

5. The provision of section 1, Article IV, state Constitution, dividing the state government into three departments, *held* to mean that the powers properly belonging to one department shall not be exercised by either of the others, and not that there shall be an absolute independence between them.—*State ex rel. Hillis v. Sullivan*, 320.

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Rescission—When Available.

1. A rescission is available where a contract has been made and the consent of the party seeking it actually had, but given by mistake or obtained through duress, menace, fraud or undue influence.—*Michalsky v. Centennial Brewing Co.*, 1.

Payment Out of Special Fund—Nature of Liability.

2. *Held*, under the rules prescribed by the Codes for the interpretation of contracts, that by a writing which provided that a loan to a corporation should be repaid monthly "out of the first earnings of its business, after deducting running expenses," it was not intended to create a general liability on the part of the company to be paid after a reasonable time, but to make the indebtedness payable out of a special fund consisting of the net proceeds as rapidly as they accumulated.—*Frank v. Butte & Boulder M. & L. Co.*, 83.

When Interpretation Unnecessary.

3. Where the words employed in a written contract are clear, certain and unambiguous, interpretation may not be resorted to to ascertain its meaning.—*Frank v. Butte & Boulder M. & L. Co.*, 83.

Interpretation—Province of Courts.

4. It is the province of courts to interpret contracts which are open to interpretation, not to make new ones for the parties or to alter or amend those which they themselves have made.—*Frank v. Butte & Boulder M. & L. Co.*, 83.

Preventing Completion—Complaint—Insufficiency.

5. Complaint in an action to recover on a contract which plaintiff claimed he was prevented by defendant from fully performing, *held* insufficient for lack of allegation that defendant's interference was wrongful, or a showing that his failure to complete the contract was excusable.—*McFarland v. Welch*, 196.

Same—Remedies—Election.

6. Where full performance of a contract is prevented by the wrongful interference of one party, the other may treat such wrongful act as a breach of the contract and at once sue for damages arising from loss of the benefits which would reasonably have followed a complete performance on his part, showing that he was injured by the breach and the extent of his injury; or treat the contract as at an end and sue upon a *quantum meruit* for the part already performed.—*McFarland v. Welch*, 196.

Breach—Nominal Damages. When.

7. Mere breach of a contract does not, in the absence of allegations showing injury and extent thereof, warrant recovery for more than nominal damages.—*McFarland v. Welch*, 134.

Same—Measure of Damages—Failure to Instruct—Reversible Error.

8. Failure to instruct the jury as to the measure of damages recoverable in an action on a contract is reversible error.—*McFarland v. Welch*, 134.

Interpretation—When Not Permissible.

9. Where the language employed in a written contract is so clear and unambiguous that it cannot be misunderstood, it is not open to interpretation.—*Butte Water Co. v. City of Butte*, 356.

Same—Cities and Towns—Water Supply—Municipal Purposes.

10. *Held*, that a contract between a city and a water company under the provisions of one paragraph of which, to the effect that the company would at a stipulated rate per hydrant supply water "necessary for fire and general municipal purposes," the city contended for water for sprinkling and other municipal purposes without additional cost, was not so free from ambiguity as to exclude interpretation, where from language in a succeeding paragraph an inference was permissible that by it the service mentioned in the former was limited to fire hydrant service, and where under another clause the company was required to furnish water free of charge for certain enumerated purposes.—*Butte Water Co. v. City of Butte*, 356.

Practical Interpretation by Parties—Effect.

11. Where the parties to a contract of doubtful or ambiguous meaning have placed a practical interpretation upon it for a number of years, it is one of the best indications of their true intent.—*Butte Water Co. v. City of Butte*, 356.

Cities and Towns—Water Mains—Extension—Liability for Expenses.

12. Under a contract between a city and a water company providing that the latter should furnish and keep supplied with water all hydrants installed in excess of the then existing hydrants, that all such hydrants should be located as the fire marshal directed and kept in good repair by the company ready for use for fire purposes, and that the city should have the right to order the water mains extended upon any street, the city was not liable for materials and labor in setting a new hydrant and laying a water main.—*Butte Water Co. v. City of Butte*, 356.

Extension—Offer and Acceptance—Evidence.

13. The contention that a contract, under the terms of which standing timber was to be removed within a certain time, had been extended by an oral agreement between the parties, was not sustained by evidence showing an offer on the part of the owner, kept open for nearly two months, and a counter-proposition by an agent of the purchaser to whom the latter had sent a check for the consideration demanded by the owner, together with instructions to close the deal, the agent breaking off negotiations without communicating the acceptance or tendering the consideration.—*Donlan v. Arnold*, 416.

Forfeiture—Relief from—Prerequisites.

14. *Held*, under the rule that before a party may have the protection afforded by section 6039, Revised Codes, against loss in the nature of a forfeiture of payments made under a contract which he has failed to fully perform, he must show by his pleading and proof that his breach of duty was not, among other things, grossly negligent, that plaintiff who, after purchasing standing timber with the understanding that it should be removed before a certain date five years thereafter, did nothing in the premises until sixty days before the expiration of the

time limit, when he entered into negotiations for an extension of the life of the contract, and then delayed taking action until a few days before the end of the five-year period when his agent, though instructed to close the transaction by accepting an offer made by the owner, broke off negotiations and failed to communicate the acceptance or tender the consideration asked, was not entitled to relief.—*Donlan v. Arnold*, 416.

Breach—Defenses—Compromise and Settlement—Erroneous Instructions.

15. In an action for breach of a contract of sale of livestock, in which defendant relied for his defense on a compromise and settlement of the differences between him and plaintiff, *held*, that the trial court properly granted a new trial because of error in too narrowly restricting the scope of such defense in its instructions to the jury.—*Leitner v. Currier*, 424.

CONVERSION.

See, also, Counterclaim, 3, 4, 6.

Conversion—Corporations—Principal and Agent.

1. Assumption of dominion over personal property of another, inconsistent with the latter's ownership of it, by a corporation through one of its agents amounts to a technical conversion of it by the agent as well as the company, if the former was acting within the scope of his employment.—*De Celles v. Casey*, 568.

Punitive Damages—Evidence—Insufficiency.

2. Evidence *held* insufficient to justify an inference of malice, fraud or oppression in either taking or detaining property in controversy in an action in conversion; hence the imposition of punitive damages, otherwise recoverable under section 6047, Revised Codes, was unwarranted.—*De Celles v. Casey*, 568.

Same.

3. Where two employees of a storage company were guilty of conversion in the first instance, the fact that one refused to divulge information in his possession of the other's appropriation of the articles to his own use was not sufficient ground for the exaction of punitive damages from him.—*De Celles v. Casey*, 568.

Excessive Verdict—Jury—Passion and Prejudice.

4. *Held*, that a verdict for \$1,050 in favor of plaintiff in an action in conversion, \$50 of which was for the value of the articles in controversy, and the balance for punitive damages, was so excessive as to warrant a new trial, even after reduction of one-half of the award ordered by the court and accepted by the plaintiff.—*De Celles v. Casey*, 568.

Return of Part of Property—Instructions.

5. Where a part of the articles in dispute in an action in conversion was returned to the plaintiff, an instruction that in arriving at a verdict the jury should consider the return thereof in mitigation of damages was proper, while one which permitted a finding for the full value of the goods returned was improper.—*De Celles v. Casey*, 568.

CONVICTS.

Assault—Personal Liability of Warden—Officers—Presumptions—Complaint—Insufficiency.

1. Complaint of an ex-convict in an action against the warden of the state prison to recover damages for an assault committed upon his person as well as for certain personal indignities inflicted upon him, such as being confined in the same cell with an insane prisoner and a negro, *etc.*, *held* not to state a cause of action, in the absence

of an allegation negating the presumption that the acts complained of were done by defendant in the performance of his official duties as warden.—*Stephens v. Conley*, 352.

Good-time Allowance—Failure to Grant—False Imprisonment—Complaint—Insufficiency.

2. To justify an ex-convict in bringing an action for false imprisonment against the warden of the state prison because of the failure of defendant to deduct from the sentence imposed upon him by the judgment of imprisonment the good-time allowance provided for by section 9737, Revised Codes, he must be able to show that the board of prison commissioners had granted him such commutation but that defendant had refused to deduct the credits allowed; otherwise the complaint fails to state a cause of action.—*Stephens v. Conley*, 352.

CORPORATIONS.

See, also, Conversion; Malicious Prosecution.

Board of Directors—Vacancy—Quorum—Validity of Corporate Acts.

1. Where only three out of five directors provided for in the articles of incorporation as the number constituting the board of directors of a railroad corporation had been selected by the stockholders, the corporate acts of the three, constituting, as they did, a quorum, were valid, as against an attack by one outside the corporation or by the state, so long as they acted either unanimously or by a majority of such quorum.—*Great Falls & Teton County Ry. Co. v. Ganong*, 54.

How Dissolved.

2. After a corporation has been lawfully organized, it continues to exist until its life expires by limitation, or it has been dissolved by one of the modes prescribed by section 3905, Revised Codes.—*Barnes v. Smith*, 309.

Capital Stock—Ownership in One Person—Effect.

3. Acquisition of all the capital stock of a corporation by one person does not vest him with legal title to the corporate property, but carries with it only an equitable interest in it.—*Barnes v. Smith*, 309.

Same.

4. Where one person acquires all the capital stock of a corporation and thereafter conducts the business in the corporate name, those who deal with the corporation may hold it liable for debts incurred in its name.—*Barnes v. Smith*, 309.

Directors—Must be *Bona Fide* Stockholders.

5. By requiring directors of corporations having capital stock to be stockholders (Rev. Codes, sec. 3833), the legislature intended that such officers should be *bona fide*, not ostensible, owners of stock.—*Barnes v. Smith*, 309.

Ownership of Stock in One Person—Effect.

6. When the entire capital stock of a corporation passes into the hands of a single person, its corporate entity, except as to strangers who deal with it as a corporation through its officers and agents, is in abeyance and its functions for the time being cease.—*Barnes v. Smith*, 309.

Estoppel.

7. One who, after acquiring all the capital stock of a corporation, makes use of the corporate machinery for his own purposes, even though acting in good faith, is estopped to deny its corporate capacity.—*Barnes v. Smith*, 309.

Corporate Entity—Ownership of Stock in One Person—Effect—Case at Bar.

8. Plaintiff, owning all the capital stock of a corporation, induced two directors, who were in reality his agents conducting the business for his sole benefit, to indorse a note of the corporation as guarantors, the proceeds of which were used by it. He later sold the stock, agreeing to deliver to the purchaser the immediate possession of the corporate property, and to save the corporation harmless from any debts, liabilities, etc. Having paid the note, he brought suit against the defendants to recover on their contract of guaranty. *Held*, that a nonsuit asked for on the ground that the debt represented by the note was that of plaintiff individually was proper, since, under the circumstances, the corporation was merged in the plaintiff, and its obligations were his own.—*Barnes v. Smith*, 309.

COUNTERCLAIM.**Statutes—Liberal Construction.**

1. Section 6540, Revised Codes, providing that an answer may contain a statement of new matter constituting a counterclaim, and section 6541 defining the nature of such counterclaim, must be liberally construed, they being designed to enable parties litigant to adjust their differences in one action, and thus to prevent a multiplicity of suits.—*Scott v. Waggoner*, 536.

Contracts—Torts—Pleading.

2. *Held*, that a counterclaim sounding in tort may be pleaded as against a demand upon contract, provided it arises out of the transaction which gave rise to plaintiff's cause of action.—*Scott v. Waggoner*, 536.

Same—Conversion—Pleading.

3. Under the rule declared in paragraph 2, *supra*, in an action by a landlord for rent due under a written lease and for damages for waste committed on the premises, a counterclaim for the conversion of personal property placed thereon by defendants was proper.—*Scott v. Waggoner*, 536.

Same.

4. The counterclaim above referred to, *held* not obnoxious to the rule that a cause of action pleaded as upon a right in favor of two or more persons jointly is not sustained by proof of a right in one of them.—*Scott v. Waggoner*, 536.

Pleasurable When.

5. Unless a counterclaim exists and is matured at the time the action in which it is sought to interpose it is commenced, it cannot be pleaded.—*Scott v. Waggoner*, 536.

Conversion—Demand and Refusal.

6. In an action by a landlord against his tenant for breach of a contract of lease, a cause of action constituting a counterclaim for the conversion of personal property belonging to the lessees and alleged to have been taken by plaintiff upon re-entry of the premises, arose only after demand and refusal to redeliver, provided the re-entry was justified; if not justified, a conversion occurred at the time of re-entry, irrespective of demand.—*Scott v. Waggoner*, 536.

COUNTIES.**New Counties—"Qualified Elector."**

1. Unless otherwise indicated in the particular Act before a court for construction, the term "qualified elector" means one who pos-

sesses the qualifications prescribed by section 2, Article IX of the Constitution.—State ex rel. Lang v. Furnish, 28.

Same—Exclusion of Territory—Signers—"Qualified Electors"—Definition.

2. *Held*, under the rule declared in paragraph 1, *supra*, on *mandamus*, that by the expression "qualified electors," as used in section 2, Chapter 133, Laws of 1913, page 484, in the provision that a petition for the exclusion of territory from a proposed new county shall be signed by at least one-half of the qualified electors residing in such territory, such persons are meant who possess the necessary constitutional qualifications, and not electors whose names appear on the great register of voters.—State ex rel. Lang v. Furnish, 28.

Same—Commissioners—Quasi-judicial Duties—Constitution.

3. The inquiry which the board of county commissioners is, by Chapter 133, Laws of 1913, page 484, required to make in ascertaining the number of qualified electors in territory sought to be excluded from a proposed new county, and whether at the time of the filing of the petition for exclusion it contained the genuine signatures of one-half such qualified electors, is *quasi-judicial* in character, and the exercise of its decisional faculty in this respect does not constitute an invasion of the constitutional provisions which lodge the judicial power of the state in its courts.—State ex rel. Lang v. Furnish, 28.

Same—Petitions for Exclusion of Territory—Evidence of Sufficiency.

4. In determining whether a petition for the exclusion of territory from a county proposed to be created was signed by 50 per cent of the qualified electors therein, the board of county commissioners may resort to whatever competent evidence it has at hand, including the great register of voters.—State ex rel. Lang v. Furnish, 28.

Same—Petitions—Withdrawal of Signatures Permitted.

5. In the absence of legislative expression to the contrary, signers of a petition may withdraw their names at any time before final action thereon; hence, the board of county commissioners erred in refusing to consider withdrawals from petitions theretofore filed asking the exclusion of certain territory from a proposed new county, such refusal being based upon the ground that the withdrawals of signatures, though filed before final action, had not been presented until after the date fixed for the hearing.—State ex rel. Lang v. Furnish, 28.

Same—Exclusion of Territory—Burden of Proof.

6. The burden of establishing the number of qualified electors residing in territory sought to be excluded from a proposed new county is upon the petitioners seeking exclusion, not upon the proponents of the new county.—State ex rel. Lang v. Furnish, 28.

Same—Petitions—When not *Prima Facie* Evidence.

7. Petitions seeking exclusion of territory from a proposed new county, unaccompanied by an affidavit to the effect that the signers are qualified electors resident in the particular territory and constitute 50 per cent of such electors in it, may not be taken as *prima facie* evidence of such facts.—State ex rel. Lang v. Furnish, 28.

Same—Petitions—Date of Filing—When not to be Considered.

8. Under the New Counties Act (Laws 1913, Chap. 133, p. 484) the matter of the creation of a new county must be determined on the case as made upon the date fixed for the hearing (save as it may be affected by subsequent withdrawals before final action taken—see paragraph 7, *supra*); therefore, protests against its creation or petitions for the exclusion of territory from within its proposed boundaries filed after the date fixed for the hearing may not be entertained by the board of county commissioners.—State ex rel. Lang v. Furnish, 28.

COUNTY ATTORNEYS.

Misconduct,—see Criminal Law, 7.

COUNTY COMMISSIONERS.

Issuance of liquor licenses,—see Intoxicating Liquors.

New counties—*Quasi-judicial* duties,—see Counties, 3.

COURTS.

See District Courts; Justices of the Peace.

CRIMINAL LAW.

Information—Irregularities—Jurisdiction—Waiver.

1. The objection that an information was filed, without leave of court, more than thirty days after the committing magistrate had lodged the papers with the clerk of the district court, must be made in writing and before demurrer or plea, or it is waived; hence, where defendant did not raise such an objection to the jurisdiction of the court until after plea and then orally, he was not in a position to complain of the action of the court in overruling the objection.—*State v. Chevigny*, 382.

Arson—Circumstantial Evidence—Sufficiency.

2. Evidence, entirely circumstantial in character, in a prosecution for arson, *held* sufficient—under the rule that where conviction is sought upon circumstantial evidence, the circumstances proved must be consistent with each other and with the hypothesis of defendant's guilt, and at the same time inconsistent with any rational hypothesis other than that of his guilt—to warrant a finding that defendant, either in person or through the agency of another, set fire to a rooming-house in the night-time.—*State v. Chevigny*, 382.

Same—Instructions—Principals and Accessories.

3. Where in a prosecution for arson there was some testimony, though not of a very convincing nature, that defendant procured someone to set the fire, the giving of instructions embodying the provisions of sections 8119 and 9167, Revised Codes, abolishing the distinction between principals and accessories, declaring all persons concerned in the commission of crime principals, etc., and the refusal of others directing the jury to find for the defendant unless they were justified beyond a reasonable doubt that he was present personally and set the fire himself, were proper.—*State v. Chevigny*, 382.

“White Slave” Act—Females—Transportation for Immoral Purposes—Interstate Commerce.

4. Since Congress has exclusive jurisdiction to regulate interstate commerce; since the transportation of passengers from one state to another is interstate commerce, and since by the Mann Act (Chap. 395, 36 U. S. Stat. 825) the Congress has assumed to regulate the transportation of females from one state to another for immoral purposes, the state legislature had no power to enact a provision covering the same subject matter, and therefore that portion of section 1, Chapter 1, Laws of 1911, covering the subject, is inoperative, and the district court properly sustained a demurrer to an information charging defendant with a violation.—*State v. Harper*, 456.

Trial—Evidence—Irrresponsive Answer—When Harmless Error.

5. Though refusal to strike out an irresponsive answer in which the witness volunteers a statement of facts from which the complaining party has probably suffered prejudice will result in a reversal of the judgment, such refusal *held* harmless error where the objectionable

statement was volunteered on cross-examination after having been twice before made on his direct examination.—State v. Jones, 505.

Character Evidence—Rebuttal—What Inadmissible.

6. Where a defendant on trial for crime calls witnesses to testify to his good character in the community in which he resides, cross-examination as to their knowledge of disparaging rumors affecting his reputation is proper, but evidence showing particular acts of lawlessness committed by the defendant is inadmissible for the purpose of rebutting testimony tending to show his good character.—State v. Jones, 505.

Attorneys—Misconduct—Questions Assuming Facts.

7. The putting of questions to witnesses in a criminal prosecution which assume the existence of facts derogatory to the character of defendant, and inadmissible if offered as independent evidence, constitutes gross misconduct on the part of the prosecuting attorney.—State v. Jones, 505.

Homicide—Self-defense—Evidence—Reputation of Deceased.

8. In a trial for homicide, where the issue is self-defense, evidence of the reputation of the deceased as a man of a turbulent and violent character (even though unknown to the defendant at the time of the killing) is admissible to aid the jury in solving the question as to who was the probable aggressor.—State v. Jones, 505.

Same—Evidence—Photographs—Admissibility.

9. After a photograph has, by the evidence of the person who made it or of any competent witness, been shown to be a fair and correct representation of one whose identity is in question, it is admissible as a means of identifying him.—State v. Jones, 505.

Same.

10. *Held*, under the rule declared in paragraph 9, *supra*, that error was committed in excluding a photograph claimed by defendant to represent deceased, together with depositions of the warden of a state prison and others to the effect that the person thus pictured was that of one J., a man of a violent disposition, as well as in rejecting an offer of testimony, by witnesses who knew deceased, to identify the photograph as his, even though it incidentally appeared therefrom that deceased was an ex-convict.—State v. Jones, 505.

Instructions—Reasonable Doubt—"Should"—"Must."

11. Instructions to the jury to the effect that before they could convict defendant of the crime of murder in the first degree they "should" be satisfied of his guilt beyond a reasonable doubt, etc., and that they "should" (instead of "must") acquit him unless they were so satisfied *held*, not reversible error.—State v. Jones, 505.

Same—Manslaughter.

12. Where under the evidence the defendant was either guilty of murder or not guilty because the homicide was done in self-defense, it was improper to instruct that "no provocation by words only, however opprobrious or threatening, will * * * reduce the killing to manslaughter," since there was not any evidence to which the instruction could apply.—State v. Jones, 505.

Same—Quantum of Proof—Improper Instructions.

13. The giving of an instruction, the effect of which was to permit the jury to weigh the evidence in a prosecution for homicide, under the rule applicable to civil cases as to the *quantum* of evidence necessary to prove a fact, was error.—State v. Jones, 505.

CROSS-EXAMINATION.

See Evidence, 10-12, 16, 19, 20.

DAMAGES.

Excessive,—see Verdicts.

Failure to instruct as to measure of,—see Instructions, 6.

Punitive damages,—see Conversion, 2-5.

Recovery in action on receiver's bond,—see Receivers, 8.

Contracts—Breach—Nominal Damages, When.

1. Mere breach of a contract does not, in the absence of allegation showing injury and extent thereof, warrant recovery for more than nominal damages.—*McFarland v. Welch*, 196.

Malicious Prosecution—Damages Recoverable—Pleading—Mental Suffering.

2. In an action for malicious prosecution plaintiff is entitled to recover general compensatory damages for whatever injury he has suffered as the natural and necessary result of a charge of an infamous crime preferred against him by defendant; therefore, since mental anxiety and suffering flow naturally and directly from a groundless and malicious prosecution based upon such a charge, plaintiff need not specially plead damages in this regard in order to warrant recovery.—*Grorud v. Lossel*, 274.

Theory of Compensation—Gifts not Allowable.

3. In the matter of damages, the law proceeds upon the theory of compensation, not upon that of gratuities or gifts.—*Kirk v. Smith*, 482.

DEATH.

Action for wrongful,—see Personal Injuries, 52-56.

DEDICATION.

See Cities and Towns, 7-12.

DEFAULTS.

Record on appeal from order vacating,—see Appeal and Error, 24.

Showing necessary to put discretion of court in motion,—see Bills of Exception, 3.

DEMURRER.

Misjoinder of causes of action in justices' courts,—see Pleading and Practice, 6.

DISCRETION.

Granting or refusing new trial,—see New Trial, 1, 2, 4.

Permitting amendment of complaint after close of evidence,—see Pleading and Practice, 23.

Permitting amendment of pleadings,—see Irrigation Districts, 4.

Sales of public lands, by state board of land commissioners,—see School Lands, 2.

Showing necessary to warrant setting aside default,—see Bills of Exception, 3.

Submission of special interrogatories,—see Jury, 2.

When not to be Exercised.

1. Where there is no room for discretion in the district court none may be exercised.—*In re Blackburn's Estate*, 179.

DISTRICT COURTS.

Jurisdiction to entertain appeal from action of board of county commissioners on application for liquor license,—see Intoxicating Liquors, 1.

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EMINENT DOMAIN.

See, also, Cities and Towns, 13-15.

Railroads—Selection of Land—Improper Method.

1. Mere mental selection of a particular tract of ground by the officers of a railroad company is not of itself sufficient to give it a preference right to acquire the ground by condemnation, as against the rights of a competing company.—Great Falls & Teton County Ry. Co. v. Ganong, 43.

Same—Right of Way—Limit of Right—Statutes.

2. The extent of the right acquired by a railroad company under subdivision 4, section 4275, Revised Codes, which limits the quantity of land such a corporation may condemn for right of way purposes, to "100 feet on each side of its center line," is confined to its necessities; in the absence of any need for the full amount thus prescribed, it cannot take it either as against the will of the owner or the requirements of a competing line.—Great Falls & Teton County Ry. Co. v. Ganong, 43.

Same—Extent of Right—Waiver.

3. The privilege extended to a railroad corporation by subdivision 4 of section 4275, Revised Codes, of taking a strip of land of the full width of 200 feet for right of way purposes, as distinguished from other purposes provided for in subdivisions 3 and 7, may be and is waived by taking a less amount.—Great Falls & Teton County Ry. Co. v. Ganong, 43.

Same—Evidence of Selection—Insufficiency.

4. A railroad company in projecting a route through a town had staked a line through the center of one of its streets 80 feet wide, caused it to be mapped, and subsequently approved by its executive officer. In an action by a rival company looking to the condemnation of a strip of land 60 feet wide immediately adjoining one side of the street, evidence *held* insufficient to sustain a finding that such strip had already been appropriated by the first company for a public use of equal necessity, *viz.*, for right of way purposes, under subdivision 4 of section 4275, Revised Codes.—Great Falls & Teton County Ry. Co. v. Ganong, 43.

EQUITABLE MORTGAGES.

See Real Property, 2.

EQUITY.

See, also, under titles pertaining to matters cognizable in courts of equity.

Record on appeal in equity cases,—see Appeal and Error, 13.

ESTATES OF DECEASED PERSONS.

See, also, Executors and Administrators; Probate Proceedings.

Claims Against Estate—Presentation—Pleadings—Conclusions.

1. An averment in plaintiff's complaint against an administratrix to recover the reasonable value of services rendered her intestate, that on a certain day and "before the time for presentation of claims against the said estate had expired" he had presented his claim to the defendant, *etc.*, *held* not open to the objection that, as to the fact that the claim had been presented within the time prescribed in the notice to creditors of the estate, it stated a mere conclusion of law; *held*, further that in the absence of a special demurrer or motion, such an inferential allegation will support proof.—Gauss v. Trump, Admx., 92.

Same—Evidence—Weight of, for Jury—Review.

2. As in other actions, so in one against the estate of a deceased person, the jury are the judges of the weight of the testimony and the credibility of the witnesses, and the supreme court in passing upon the sufficiency of the evidence to support the verdict in such a case will be guided by the same canons of review which obtain in other actions at law.—*Gauss v. Trump, Admx., 92.*

Same—Oral Contracts—Modification—Evidence—Sufficiency.

3. Evidence in an action to recover from an estate on a quantum meruit for services performed for decedent under an alleged agreement by the terms of which she agreed to devise her ranch to plaintiff in consideration of his managing the same during her lifetime. Held sufficient to warrant the jury in finding in favor of plaintiff, inasmuch as though it showed a departure by him from the agreement as originally made, it also disclosed a modification of the original agreement and performance on his part so far as performance was required of him under such modification.—*Gauss v. Trump, Admx., 92.*

Same—Defective Judgment.

4. A judgment in an action against an administratrix to recover for services rendered to deceased, to the effect that plaintiff "have and recover" from the defendant, as administratrix, the amount of the verdict and costs, though defective under section 7536, Revised Codes, does not require a reversal of the judgment.—*Gauss v. Trump, Admx., 92.*

Same—Presentation—Statutes—Variance—Failure of Proof.

5. A claim against an estate founded upon a note or other instrument in writing must, under section 7529, Revised Codes, be accompanied by a copy of it, or, if the original be lost or destroyed, an affidavit must be appended stating such fact, and containing a copy of description of the writing. Under section 7532, the holder of such a claim cannot maintain an action on it unless the very claim sued upon has first been presented to the executor or administrator. While a claim presented to defendants as executrix did not purport to be based upon a promissory note, the complaint alleged, and the evidence showed, that it was. Held, that there was such a variance as amounted to a failure of proof.—*Vanderpool v. Vanderpool, Executrix, 448.*

Same—Complaint—When Insufficient.

6. A complaint in an action to recover on a claim against an estate fails to state a cause of action unless it expressly alleges that the claim as made was first duly presented to the executor or administrator. *Vanderpool v. Vanderpool, Executrix, 448.*

Same—When Action will not Lie.

7. Statutes such as section 7525, Revised Codes, providing that claims against estates upon causes of action which sound in contract are barred unless presented within the time limited in the notice for their presentation, supersede the general statutes of limitations and compliance with their terms is essential to the maintenance of actions thereon.—*Vanderpool v. Vanderpool, Executrix, 448.*

Same—Presentation of Claim—Executors and Administrators—Attorneys—Waiver—Estoppel.

8. Neither an executor or administrator, nor an attorney for the estate, can waive any substantial right affecting the interests of the heirs or creditors, nor can either be estopped by his conduct to their prejudice; hence an executrix was not estopped to contest a claim because of alleged misleading statements and assurances made by the attorney of the estate, which induced the claimant to omit compliance with the provisions of the statute prescribing the manner of presenting the claim.—*Vanderpool v. Vanderpool, Executrix, 448.*

ESTATES IN LAND.

See Taxation.

ESTOPPEL.

By failure to appeal,—see Receivers, 6.

By pleadings,—see Receivers, 7.

By negligence of officers,—see Cities and Towns, 12.

Contesting claims against estate,—see Estates of Deceased Persons, 8.

Denial of corporate capacity,—see Corporations, 7.

Waiver by failure to plead,—see Pleading and Practice, 20.

EVIDENCE.

See, also, Criminal Law.

Credibility of witnesses,—see, also, Jury, 3.

Weight, for Jury.

1. Plaintiff's evidence, though unsupported and opposed by the statements of a large number of defendant company's witnesses, *held* sufficient, if credited by the jury, to support a verdict in his behalf.—*Michalsky v. Centennial Brewing Co.*, 1; *Lizott v. Big Blackfoot M. Co.*, 171.

Instructions—Effect of Evidence.

2. Where weaker and less satisfactory evidence is offered when stronger and more satisfactory is within the power of the party, that offered should be viewed with distrust is a fundamental canon of proof, and an instruction embodying it is not open to objection.—*Michalsky v. Centennial Brewing Co.*, 1.

Weight of, for Jury—Review.

3. As in other actions, so in one against the estate of a deceased person, the jury are the judges of the weight of the testimony and the credibility of the witnesses, and the supreme court in passing upon the sufficiency of the evidence to support the verdict in such a case will be guided by the same canons of review which obtain in other actions at law.—*Gauss v. Trump, Admx.*, 92.

Explosives—Appliances—Negligent Method—Evidence—Sufficiency.

4. Evidence *held* sufficient to justify submission to the jury of the question whether or not defendant had, in the selection of electricity for thawing dynamite, adopted a reasonably safe method, as well as to sustain the charge of negligence based on the overheating of the explosives through the means employed.—*Westlake v. Keating Gold Min. Co.*, 120.

Same—Cause of Explosion—Expert Testimony—Admissibility.

5. Evidence sought to be elicited from miners who, though not claiming any precise knowledge of the constituents of dynamite, had handled it and knew its properties from a practical point of view, tending to show that the bursting of an electric light bulb may bring about an explosion of dynamite being thawed in a box by means of incandescent electric lights, was admissible.—*Westlake v. Keating Gold Min. Co.*, 120.

Motion to Strike Testimony—When Refusal not Error.

6. Refusal of motion to strike all of certain testimony, parts of which only were inadmissible, was not error.—*Westlake v. Keating Gold Min. Co.*, 120.

Appliances Used Elsewhere—Evidence Inadmissible, When.

6a. Where the charge of negligence on the part of the defendant and owner was based, not upon the use of electricity in thawing dynamite but upon the manner and extent in which it was employed, evidence that it was not elsewhere resorted to as a thawing agency was properly excluded.—*Westlake v. Keating Gold Min. Co.*, 120.

Same—Safety of Appliance—Expert Testimony—Admissibility.

7. The question whether the use of electricity for thawing dynamite as employed by defendant was a safe one, was properly one for expert testimony.—*Westlake v. Keating Gold Min. Co.*, 120.

Offer of Proof—When Rejection Proper.

8. Where documentary evidence is offered, some of which is admissible and some of which is not, the offer may be rejected as a whole.—*Western Mining S. Co. v. Melzner*, 174.

Claim and Delivery—Cross-examination—Scope.

9. Where plaintiff in an action in claim and delivery had testified that he had permitted fifty head of cattle (the subject of the action), valued at \$1,400, to be taken many miles away by a stranger upon a deposit of \$300, under an agreement amounting to a bailment with an option to purchase, a question asked him on cross-examination whether he had made any investigation as to the person's standing or character was improperly excluded.—*Cuerth v. Arbogast*, 209.

Same.

10. Refusal to permit the wife of plaintiff to be cross-examined as to the details of the negotiations had between him and the person who took possession of the cattle under the circumstances referred to in paragraph 9 above, after she had testified to the transaction and that it did not amount to a sale, was error.—*Cuerth v. Arbogast*, 209.

Same—Cross-examination—Scope—Statutes.

11. Section 8021, Revised Codes, prescribing in general terms the scope of cross-examination, must be liberally construed, and the rule extended rather than restricted.—*Cuerth v. Arbogast*, 209.

Same—Admissibility.

12. It was error to exclude the checks given by defendant in payment of the cattle sought to be recovered in an action in claim and delivery, and which he claimed to have bought in good faith from a third person while in the latter's possession.—*Cuerth v. Arbogast*, 209.

Same—Documentary Evidence.

13. Evidence consisting of a note given by the apparent owner of the cattle and a chattel mortgage to secure the debt evidenced by it, which latter remained of record uncanceled for more than a month at the time defendant claimed to have bought the livestock, was competent for the purpose of re-enforcing the presumptions relative to the possession and ownership of property (Rev. Codes, subds. 8, 11, 12, sec. 7962).—*Cuerth v. Arbogast*, 209.

Livestock—Brands—Evidence of What.

14. *Held*, that while a recorded brand or a certificate thereof is *prima facie* evidence of its ownership, it is not *prima facie* evidence of ownership of the animal bearing it; it is a circumstance to be considered with others as tending to show, but in itself insufficient to prove, ownership.—*Cuerth v. Arbogast*, 209.

Technical Error—Effect.

15. For merely technical error in the admission and exclusion of evidence which did not result in prejudice to appellant, a judgment will not be reversed.—*De Sandro v. Missoula L. & W. Co.*, 226.

Personal Injuries — Independent Contractors — Payment of Wages — Evidence — Cross-examination — Proper Exclusion.

16. Plaintiff having testified that his wages had been paid through check by one H., alleged by defendant corporation to have been an independent contractor, an objection to the question asked him on cross-examination whether he knew for whom he was working was properly sustained as immaterial, the issue being, who was in fact his employer and not his knowledge as to the relation existing between H. and the company.—*De Sandro v. Missoula L. & W. Co.*, 226.

Same — Independent Contractors — Evidence — Admissibility.

17. Plaintiff's evidence that he saw defendant company's foreman on the ditch line the day before the accident, and that the latter had ordered the person in charge to keep the crew at work at a certain point, was admissible as tending to show how far the company retained control of the work, it being its contention that it was being done by its codefendant, an independent contractor.—*De Sandro v. Missoula L. & W. Co.*, 226.

Circumstantial Evidence — Sufficiency.

18. Where, in a civil action, circumstantial evidence solely is relied on by plaintiff to prove an issue of fact, it is sufficient to sustain the verdict or decision if it produces moral certainty in an unprejudiced mind as to the truth of his theory to the exclusion of any theory opposed thereto; the rule requiring proof beyond a reasonable doubt being applicable to criminal causes only.—*Gilmore v. Ostronich*, 305.

Proper Cross-examination.

19. A party may not complain of questions on cross-examination, the door to which he himself opened by his direct examination of the witness.—*Smith v. Zimmer*, 332.

Improper Cross-examination.

20. Where a witness on his direct examination had testified as to the physical condition of a street in which he had left it the day preceding the night on which plaintiff was injured by reason of a defect therein, so far as the placing of lights or barriers was concerned, a question on cross-examination touching his previous experience in road work was improper.—*Snyder v. Town of Chinook*, 484.

Trial — Objections — Practice.

21. Where objection to evidence of a certain character has once been made, it is not incumbent upon counsel, nor proper, to constantly repeat the same objection to like evidence by other witnesses. *State v. Jones*, 505.

EXCEPTIONS.

See Bills of Exceptions.

EXECUTORS AND ADMINISTRATORS.

Annual representation work on mining claims — Notice, — see Mines and Mining, 3–5.

Cannot waive substantial right affecting interests of estate, — see Estates of Deceased Persons, 8.

Claims against estates, — see Estates of Deceased Persons, 2, 3.

Administrators — Right to Nominate — Waiver — Effect.

1. The prior right conferred by section 7432, Revised Codes, upon those most interested in an intestate's estate to administer it may be waived; and if waived in favor of another, the renunciation, if fairly procured and freely made, is irrevocable.—*In re Blackburn's Estate*, 179.

Same—Husband and Wife—Rights of Widow.

2. It is the policy of the law that the widow shall control *in limine* the administration of her late husband's estate, and to that end she may either administer it herself or nominate some competent person in whom she places trust and confidence.—In re Blackburn's Estate, 179.

Same—Right of Widow—Competency.

3. An assertion of claim to property which the other heirs contend belongs to the estate does not render the widow or her nominee incompetent to administer it.—In re Blackburn's Estate, 179.

Same—Nomination by Widow—Waiver—When not Irrevocable.

4. Denial of the petition of a widow for the revocation of letters of administration upon the estate of her husband theretofore issued to her stepson at her request, *held* error where the waiver of her right to administer it herself had not been fairly procured or freely given.—In re Blackburn's Estate, 179.

Same—Removal—Pleadings—Sufficiency.

5. In a proceeding in which one primarily entitled to the administration of an estate seeks the revocation of letters issued to his nominee, a strict technical observance of the rules of pleading in the preparation of the complaint was not required, it appearing at the hearing that defendant was not taken by surprise but was fully informed of the nature and scope of the charges made.—In re Blackburn's Estate, 179.

Same—Removal—Discretion.

6. Where there is no room for discretion in the district court none may be exercised; hence where the renunciation of her prior right to administer the estate of her late husband had not been fairly procured from the widow, her statutory right had not been exhausted, and it was not within the discretionary power of the court to deny her the exercise of it.—In re Blackburn's Estate, 179.

Same—Removal—Insufficient Grounds.

7. Alleged failure by an administrator to include a gold watch and a pair of field-glasses in his inventory of an estate valued at about \$35,000, constituted no valid ground for his removal, where subsequent to the petition for revocation of his letters he filed a supplemental inventory including such articles.—In re Blackburn's Estate, 179.

Same—Incompetency—Right of Nomination.

8. A person primarily entitled to administer an estate but rendered incompetent by a want of understanding or integrity is not thereby deprived of the right to nominate someone to act in his stead.—In re Blackburn's Estate, 179.

EXPERT TESTIMONY.

See Evidence, 5, 6, 20.

EXPLOSIVES.

See Personal Injuries, 10-19.

FALSE IMPRISONMENT.

See, also, Malicious Prosecution, 6; Convicts, 2.

Gist of Action.

1. The gist of the offense of false imprisonment as defined in section 8324, Revised Codes, is the unlawful detention.—*Stephens v. Conley*, 352.

FINDING LOST CHATTELS.

See Livestock.

FINDINGS.

Implied findings,—see Water and Water Rights, 7.

FORFEITURES.

See Contracts, 14; Mines and Mining, 3-5.

FRAUD.

Evidence—Sufficiency

1. Evidence in an action for damages for fraud charged by plaintiff to have been practiced upon him in the sale of land, the defendant, acting in collusion with a civil engineer who had been employed by plaintiff to survey the land, falsely representing to him that the tract contained a much larger acreage suitable for fruit growing than was actually embraced in it, *held* sufficient to sustain a finding in plaintiff's favor.—*Shoudy v. Reeser*, 579.

Verdict—Court may Direct, When.

2. Where the facts in an action for fraud are not controverted and furnish the basis of but one inference, *i. e.*, that the defendant is guilty of the fraud alleged, the court may infer the fraud as a matter of law and direct a verdict in favor of plaintiff.—*Shoudy v. Reeser*, 579.

Erroneous Instruction.

3. In the absence of active participation by defendant in the false representations made to plaintiff by the latter's agent, defendant could not have been held accountable even though he had knowledge of the agent's wrongdoing; hence an instruction that plaintiff should recover from defendant if the real facts had been suppressed by the agent with the knowledge of defendant was erroneous.—*Shoudy v. Reeser*, 579.

GIFTS.

See Damages, 3.

HARMLESS ERROR.

Defective judgment in action against administrator,—see Judgments.

In admission or exclusion of evidence,—see Appeal and Error, 11.

Error in instruction in appellant's favor,—see Instructions, 10.

Microscopic error in instructions,—see Instructions, 11.

HIGHWAYS.

Defects in—Duty of road supervisors,—see Personal Injuries, 56, 57.

Defective Streets,—see Personal Injuries, 64, 65.

HOMICIDE.

See Criminal Law, 5-13.

HUSBAND AND WIFE.

See, also, Marriage.

Right of one to administer estate of the other,—see Executors and Administrators, 1-8.

IMPLIED FINDINGS.

See Findings.

INDEPENDENT CONTRACTORS.

See Personal Injuries, 41-48.

INFORMATION.

Waiver of irregularities,—see Criminal Law, 1.

INJUNCTION.

See Cities and Towns, 6.

INSTRUCTIONS.

See, also, Criminal Law.

Verdicts, when not against law,—see Verdicts, 2.

To be Viewed How.

1. Instructions must be considered as a whole; hence, where the various defenses interposed by defendant in a personal injury action were treated in separate paragraphs of the charge, the contention that by this method the jury were led to infer that defenses not referred to in a particular paragraph were not in the case had no merit.—*Michalsky v. Centennial Brewing Co.*, 1.

Effect of Evidence.

2. Where weaker and less satisfactory evidence is offered when stronger and more satisfactory is within the power of the party, that offered should be viewed with distrust, is a fundamental canon of proof, and an instruction embodying it is not open to objection.—*Michalsky v. Centennial Brewing Co.*, 1.

Personal Injuries—Assumption of Risk—Proper Refusal.

3. An instruction on the subject of assumption of risk which does not advise the jury that the person to be charged therewith must have appreciated and realized the danger incident to his employment, may properly be refused.—*Mosher v. Sutton's New Theater Co.*, 137.

Same—"Losses" or "Damages"—Harmless Error.

4. An instruction telling the jury that the employer must indemnify his employee for the "losses" caused by the former's want of ordinary care, *held* not so meaningless as to be confusing, the term "losses" evidently being used in the sense of legal damages.—*Mosher v. Sutton's New Theater Co.*, 137.

Modified Instructions—When Refusal Proper.

5. A trial court cannot be put in error for refusing a suggested modification of an instruction, unless the instruction, as modified, correctly states the law and is applicable to the facts of the case before it.—*Western M. Supply Co. v. Melzner*, 174.

Measure of Damages—Failure to Instruct—Reversible Error.

6. Failure to instruct the jury as to the measure of damages recoverable in an action on a contract is reversible error.—*McFarland v. Welch*, 196.

Agreements to Purchase—To be in Writing.

7. Plaintiff's claim having been that the transaction between him and the person to whom he delivered cattle amounted to a bailment with an option to purchase, although the contract had not been reduced to writing, the court should, in view of section 5092, Revised Codes, which provides that unless a contract of sale of personal property where title is stipulated to remain in the vendor until final payment is in writing, and filed for record, *etc.*, the transaction is void as to a purchaser prior to filing, have defined an agreement to sell and told the jury to find for defendant if the transaction was

such an agreement, and he bought the cattle while in the ostensible owner's possession.—Cuerth v. Arbogast, 209.

Abstract Rules of Law—Refusal not Error.

8. Refusal to submit abstract rules of law, such as the presumptions prescribed by subdivisions 8, 11 and 12 of section 7962, relative to the possession and ownership of property, to the jury in the form of instructions is not error.—Cuerth v. Arbogast, 209.

Defective Instructions—Duty of Appellant.

9. Before appellant can complain of an instruction given the jury because not as specific as it should have been, it was his duty to offer one not containing that defect.—Kirk v. Smith, 482.

Error in Appellant's Favor.

10. Of an error in an instruction which is in his favor, appellant may not complain.—Grorud v. Loss, 274.

Harmless Error.

11. Microscopic error in the giving of instructions touching the amount which the jury might award for loss of earning capacity in a personal injury action, will not work a reversal of the judgment.—Snyder v. Town of Chinook, 484.

To be Viewed as a Whole.

12. Instructions must be viewed as a whole where error in giving and refusing certain of them is relied on for a reversal of the judgment.—Scott v. Waggoner, 536.

Jury Must Obey—Exception.

13. In all cases, except libel, the jury are bound by the instructions of the court; a verdict in disregard of them will be set aside as against law.—Harrington v. Butte Miner Co., 550.

INTERSTATE COMMERCE.

Transportation of females for immoral purposes,—see Criminal Law, 4.

INTOXICATING LIQUORS.

Licenses—Appeal to District Court—Procedure—Jurisdiction.

1. Under section 3, of Chapter 35, Laws of 1913, the applicant for license to sell liquor in any place not within the corporate limits of a city or town, as well as the protestants against the issuance thereof, may appeal from the action of the board of county commissioners to the district court, the appeal to be taken in the manner provided for appeals from justice of the peace courts, the position of the board being that of the justice as relates to the practice to be pursued. To make an appeal from a justice's court effective, a notice of appeal as well as an undertaking must be filed with the justice. *Held*, that where protestants against the issuance of a license omitted to file either a notice of appeal or an undertaking with the board, the district court did not acquire jurisdiction of the appeal, in the absence of conduct amounting to a waiver by the adverse party—the applicant for license.—State ex rel. Hackshaw v. District Court, 477.

Prohibition—Does not Lie, When.

2. The members of a board of county commissioners having had no personal interest in whether the district court should entertain an appeal from the board's decision on an application for a liquor license in a village, their application to restrain such court from so doing cannot be entertained.—State ex rel. Hackshaw v. District Court, 477.

INTOXICATION.

See Jury, 4; Personal Injuries, 22.

IRRIGATION DISTRICTS.

Mileage and per diem of witnesses at hearing.—see Witnesses, 1, 2.

Liberal Construction of Act, When.

1. After the district court has acquired jurisdiction of the subject matter and the parties to a proceeding instituted under Chapter 145, Laws of 1909, relative to the creation of irrigation districts, by a proper petition filed with the clerk of the court, the provisions of the Act and the rules of procedure must be given the most liberal construction, to the end that the purpose of the statute may be carried into effect.—In re Gallatin Irr. Dist., 605.

Petition—Insufficiency—Dismissal.

2. The petition necessary to confer jurisdiction upon the district court to create an irrigation district under Chapter 146, Laws of 1909, must be signed by a majority in number of the land owners in the district who also own more than one-half of the acreage therein; hence where such a petition disclosed on its face that it was not signed by a majority of the land owners in the proposed district, an order dismissing it was proper.—In re Gallatin Irr. Dist., 605.

Public Lands—Settlers—Taxation.

3. A settler upon government land has not any taxable interest in it prior to making final proof; therefore, since all land comprised in an irrigation district created under Chapter 146, Laws 1909, is subject to an annual levy of taxes for the running expenses of the district, neither homestead nor desert entries may be taken into consideration in passing upon the sufficiency of a petition for the creation of such a district.—In re Gallatin Irr. Dist., 605.

Petition—Amendment—Discretion.

4. In the exercise of the powers conferred upon the district court in the creation of irrigation districts (Laws of 1909, Chapter 146), it may exercise a wide discretion, an abuse of which, in refusing to permit a petition to be amended by the exclusion of lands and the addition of others, must be shown to put the court in error in dismissing the petition on the ground of insufficiency.—In re Gallatin Irr. Dist., 605.

ISSUES.

Determinable as of What Date.

1. All issues must be determined as of the date of the commencement of the action.—Scott v. Waggoner, 536.

JOINDER OF CAUSES OF ACTION.

See Actions, 1, 2.

JUDGMENTS.

Vacating default judgment—Record on appeal,—see Appeal and Error, 24.

Defective—Harmless Error.

1. A judgment in an action against an administratrix to recover for services rendered to deceased, to the effect that plaintiff "have and recover" from the defendant, as administratrix, the amount of the verdict and costs, though defective under section 7536, Revised Codes, does not require a reversal of the judgment.—Gauss v. Trump, Admx., 92.

What Matters Concluded by.

2. As between the parties to an action, the judgment is an adjudication, not merely of the conclusions expressed, but of everything

necessarily included in them.—*Lyon v. United States F. & G. Co.*, 591.

JURISDICTION.

See Criminal Law, 1; District Courts; Justices of the Peace.

JURY.

See, also, Verdicts.

Weight of evidence, for,—see Evidence, 1, 3.

Inspection of Premises—Presumptions.

1. Where, at the request of defendants (appellants), the jury were taken to view machinery, then said by the former to be in the same condition as at the time of the accident, it will be presumed on appeal, in the absence of evidence to the contrary, that, in returning a verdict in favor of plaintiff, they found the machinery to have been unguarded as charged by plaintiff.—*Michalsky v. Centennial Brewing Co.*, 1.

Special Interrogatories—Discretion.

2. The submission of special interrogatories in personal injury actions, such as whether the place at which the accident occurred was reasonably well lighted, etc., though commendable practice, is nevertheless within the discretion of the trial court, and therefore refusal to submit is not subject to correction on appeal.—*Michalsky v. Centennial Brewing Co.*, 1.

Credibility of Witnesses—Province of Jury.

3. The credibility of witnesses is a matter within the exclusive province of the jury; hence the contention of defendant on appeal from the judgment and order denying a new trial, that the jury should have discredited plaintiff and his witnesses and believed those of defendant, is of no avail.—*Mosher v. Sutton's New Theater Co.*, 137; *Gronud v. Lossel*, 274.

New Trial—Misconduct of Juror—Intoxication.

4. Misconduct on the part of a juror because of intoxication while deliberating on the verdict may not be proved by the affidavit of another juror.—*Snyder v. Town of Chinook*, 484.

JUSTICES OF THE PEACE.

Jurisdiction.

1. The jurisdiction of a justice's court is not dependent upon the amount which one might recover if he saw fit to make the demand, but upon the amount which he actually asks for; hence where plaintiff might, under section 2091, Revised Codes, have sued for \$350 because of the wrongful rescue of animals which had been trespassing upon his premises, but his demand was for only \$286, the court had jurisdiction of the cause.—*Reynolds v. Smith*, 149.

Causes of Action—Misjoinder—Demurrer.

2. So long as causes of action joined in one complaint are of such a character that a justice's court has jurisdiction of each of them, and the aggregate of the demands does not exceed \$300, a demurrer for misjoinder does not lie in such a court.—*Reynolds v. Smith*, 149.

Notice of Appeal—Sufficiency.

3. A notice of appeal from a judgment rendered by a justice of the peace is sufficient if from its contents the adverse party can ascertain what he must do to protect his rights in the further proceedings to be had in the appellate court; hence failure to state the amount of the judgment appealed from did not invalidate such a notice where it was otherwise sufficiently specific to give the in-

formation first above referred to.—*Marlowe v. Michigan Stove Co.*, 342.

Undertaking on Appeal—Sufficiency.

4. An undertaking on appeal to the district court which meets all the requirements of section 7124, Rev. Codes, relative to amount and conditions, is not rendered invalid by the insertion of additional conditions not in anywise affecting the liability of the sureties under the statute.—*Marlowe v. Michigan Stove Co.*, 342.

Defective Undertakings—Amendment—Dismissal.

5. The rule that where the original undertaking on appeal to the supreme court is not wholly void but merely defective and therefore amendable, the filing of a substituted one preserves the appeal if approved by a justice of the supreme court under section 7116, Revised Codes, *held* applicable to substituted undertakings on appeals to district courts, filed and approved as provided by section 7128.—*Marlowe v. Michigan Stove Co.*, 342.

Same—Amendment—Erroneous Dismissal.

6. *Held*, under the rule *supra*, that an undertaking on appeal from a justice's court which in one clause effectively secured the payment of costs and in another attempted to do likewise with reference to the judgment but failed, though wholly void as to the latter clause, was good as to the former, and therefore an amended undertaking approved by a district judge rendered the appeal proof against dismissal for insufficiency.—*Marlowe v. Michigan Stove Co.*, 342.

LACHES.

Evidence showing—Admissibility,—see Mines and Mining, 5.

LAST CLEAR CHANCE DOCTRINE.

See Personal Injuries, 31, 32.

LIBEL.

Defense—Illegal Business—Wrestling.

1. Where an alleged libel is in respect to an unlawful business carried on by plaintiff, such as that pursued by a professional wrestler, contrary to the provisions of section 8576, Revised Codes, he cannot maintain the action for the purpose of recovering damages for injury to his business.—*Brown v. Independent Publishing Co.*, 374.

Pleading—Special Damages.

2. If a publication is not libelous *per se*, damages are not recoverable unless they are alleged specially.—*Brown v. Independent Publishing Co.*, 374.

Innuendo—Surplusage.

3. If a publication is not libelous *per se*, it cannot be made so by innuendo.—*Brown v. Independent Publishing Co.*, 374.

Construction of Language—Publication Libelous *per se*.

4. In determining whether language complained of is libelous *per se*, it must be considered in its relation to the entire article in which it appears; and to warrant the conclusion that it is of such character, the words must be susceptible of but one meaning, *vis.*: that from its publication pecuniary loss to plaintiff necessarily must, or presumably did, follow as its proximate consequence.—*Brown v. Independent Publishing Co.*, 374.

Case at Bar—Complaint—Insufficiency.

5. *Held*, that the publication of an article containing the words: "S. [a professional wrestler] refused to pay room rent," was not

libelous *per se*; hence, in the absence of an allegation specially pleading facts showing pecuniary loss because of the publication of such words, his complaint did not state a cause of action for libel.—*Brown v. Independent Publishing Co.*, 374.

Instructions to Jury—Advisory Only.

6. In an action for libel, the court's instructions, to the extent of determining whether the publication complained of is or is not libelous, are advisory only and may be disregarded by the jury; hence a general verdict in favor of defendant, contrary to the directions of the trial court, was not a ground for granting a new trial.—*Harrington, Admr., v. Butte Miner Co.*, 550.

LICENSES.

See *Intoxicating Liquors*, 1, 2.

LIVESTOCK.

See, also, *Marks and Brands*.

Failure to furnish cars to carry,—see Actions, 1, 2.

Finding Lost Animals—Complaint—Insufficiency.

1. Assuming that sections 5178–5186, Revised Codes, dealing with the subject "Finding," are applicable to the case of one who picks up estray domestic animals, takes care of and feeds them, the complaint, which omitted to allege that the animals were in fact lost, did not state a cause of action under these sections.—*Kirk v. Smith*, 489.

Same—Damages—Compensation—Gratuities—Erroneous Instruction.

2. In the matter of damages, the law proceeds upon the theory of compensation, not upon that of gratuities or gifts; it was therefore error to instruct the jury that in addition to the compensation awarded to plaintiff for taking care of estray livestock, they might add a reasonable reward for keeping them, the word "reward" used in section 5181, Revised Codes, meaning remuneration and not gratuity.—*Kirk v. Smith*, 489.

Same—Compensation—Proof.

3. In an action for compensation for taking care of an estray band of sheep, the fact that plaintiff had mingled them with other sheep did not prevent him from recovering for his services, provided he could show the value of the proportion of his time, labor, feed, *etc.*, given to the estrays.—*Kirk v. Smith*, 489.

MALICE.

See *Presumptions*, 1.

MALICIOUS PROSECUTION.

Corporations.

1. An action for malicious prosecution lies against a corporation, as well as against a natural person.—*Grorud v. Loss*, 274.

Same—Agents—Liability of Corporation.

2. Where an agent of a corporation, in the discharge of his duties and within the apparent scope of his authority, does an act from which a third person suffers injury, the corporation is liable for the damages flowing therefrom, even though the agent may have failed in his duty to it or disobeyed its instructions; and, if the act is prompted by fraudulent or malicious motives, the agent's fraud or malice is imputable to the corporation.—*Grorud v. Loss*, 274.

Same—Officers—Presumptions.

3. Where the president of a mercantile corporation had instituted a prosecution against one for larceny of its funds, the presumption arose that he was acting in its behalf; in the absence of evidence, however, that another corporation of which he was also president had any connection with the larceny charge, it could not be presumed that he was also proceeding in its behalf, and a motion for nonsuit as to the latter corporation should have been sustained in an action for malicious prosecution.—*Grorud v. Lossi*, 274.

Probable Cause—Malice—Presumptions.

4. While the plaintiff in an action for malicious prosecution must prove both the want of probable cause and malice, in order to make a *prima facie* case the presence of the latter may be inferred by the jury where the absence of the former has been established.—*Grorud v. Lossi*, 274.

Evidence—Sufficiency—Conflicting Evidence—Defenses—Consulting Attorney.

5. Where the evidence as to the existence of probable cause for a criminal prosecution consisted of conflicting statements made by the plaintiff and the defendant, its credibility, with the inferences justly deducible from it, was a matter for the jury; hence, having concluded that the charge was without probable cause, they were justified, under the rule declared in paragraph 4, *supra*, to infer that defendant was prompted by malicious motives in preferring it, even though it appeared that defendant had consulted a county attorney before acting.—*Grorud v. Lossi*, 274.

False Imprisonment—Distinction.

6. Where an arrest and imprisonment are brought about by legal process, but the prosecution is instituted and carried on maliciously and without probable cause, it constitutes "malicious prosecution"; but if the arrest and imprisonment are accomplished without legal process, it is "false imprisonment," which gives a right of action whether prompted by malice or not.—*Grorud v. Lossi*, 274.

Same—Arrest and Imprisonment—Presence of, not Indispensable—Instructions—Harmless Error.

7. A showing that plaintiff in an action for malicious prosecution was arrested, or imprisoned or held to bail is not indispensable, it being sufficient to sustain the action if it appears that he has maliciously and without probable cause been vexed and harassed by a criminal prosecution; therefore, an instruction implying that proof of both arrest and imprisonment were necessary to warrant a verdict for plaintiff was error, but error in favor of defendant of which he was not in a position to complain.—*Grorud v. Lossi*, 274.

Damages Recoverable—Pleading—Mental Suffering.

8. In an action for malicious prosecution plaintiff is entitled to recover general compensatory damages for whatever injury he has suffered as the natural and necessary result of a charge of an infamous crime preferred against him by defendant; therefore, since mental anxiety and suffering flow naturally and directly from a groundless and malicious prosecution based upon such a charge, plaintiff need not specially plead damages in this regard in order to warrant recovery.—*Grorud v. Lossi*, 274.

Termination of Prosecution—Showing Necessity.

9. In an action for malicious prosecution, it must appear, by admissions in the pleadings or by the proof, that the prosecution on account of which plaintiff is suing is at an end.—*Grorud v. Lossi*, 274.

Discharge by Magistrate—Evidence of Want of Probable Cause—Instructions.

10. Where, after a full investigation of all the facts within the knowledge of the prosecuting witness, defendant prosecuted for a felony is discharged by a committing magistrate, such discharge is some evidence that the prosecution was groundless; hence, a requested instruction that the jury should consider the discharge only as evidence that the prosecution had terminated but that it was not any evidence of a want of probable cause was properly refused.—*Grorud v. Lossi*, 274.

Pleading and Proof.

11. In order to make out a *prima facie* case of malicious prosecution, the plaintiff must allege and prove the commencement of a prosecution against him through defendant's instigation, want of probable cause, malice, favorable termination of prosecution, the damage suffered and the amount thereof.—*Stephens v. Conley*, 352.

Argumentative Denials.

12. In an action for malicious prosecution, affirmative allegations of the answer showing probable cause, advice of counsel, absence of malice, and good faith on the part of defendant, held argumentative denials, making a reply to them unnecessary.—*Stephens v. Conley*, 352.

Defective Complaint—Cured by Answer.

13. *Held*, that plaintiff's failure to allege that a judicial proceeding had been instituted or prosecuted against him was supplied by defendant's statement that he caused a criminal prosecution to be brought against plaintiff, describing the particular steps taken; *held*, further, that his omission to plead a favorable termination of the action was cured by defendant's allegation that plaintiff was by an order of the district court discharged from custody and from prosecution on the charge preferred.—*Stephens v. Conley*, 352.

MANDAMUS.

See Counties, 1-8; District Courts, 2; School Lands, 2.

MAPS.

Incorporation in record on appeal,—see Appeal and Error, 19.

MARKS AND BRANDS.**Brands—Purpose of Statute.**

1. The purpose of the Mark and Brand Act (Rev. Codes, sec. 1790 *et seq.*) is to secure to the person who records his brand the exclusive use of the design adopted; and the object sought in requiring a brand to be vented is to foreclose the vendor's claim to the animal sold.—*Cuerth v. Arbogast*, 209.

Same—Evidence of What.

2. *Held*, that while a recorded brand or certificate thereof is *prima facie* evidence of its ownership, it is not *prima facie* evidence of ownership of the animal bearing it; it is a circumstance to be considered with others as tending to show, but in itself insufficient to prove, ownership.—*Cuerth v. Arbogast*, 209.

MARRIAGE.**When Void.**

1. A marriage contracted while the man had a wife living with whom he was at the time in correspondence relative to a divorce, of

which fact, however, the woman was ignorant, was void under section 3612, Revised Codes.—*In re Huston's Estate*, 524.

Evidence of Cohabitation—Insufficiency.

2. Evidence *held* insufficient to show that "public assumption of the marital relation" which the law (sec. 3607, Rev. Codes) demands in the absence of a solemnization, in order to constitute a valid marriage, it appearing that the cohabitation of the parties was clandestine.—*In re Huston's Estate*, 524.

Validity of, in Sister State—Effect of, in Montana.

3. Under section 3614, Revised Codes, recognizing as valid all marriages entered into without this state, if valid under the laws of the country in which they were contracted, evidence of cohabitation *held* sufficient to create a presumption of a legal marriage in the state of Washington; hence the status of the parties in this state was that of husband and wife.—*In re Huston's Estate*, 524.

MASTER AND SERVANT.

See Personal Injuries.

MILEAGE AND PER DIEM.

See Witnesses, 1, 2.

MINES AND MINING.

See, also, Taxation.

Mining Claims—Declaratory Statement—Description—Degree of Accuracy Required.

1. Though it was not necessary that a declaratory statement of a quartz lode location made under amended section 3612, Political Code of 1895 (Laws 1901, p. 141), contain a description of the claim by metes and bounds, or that the statements therein be made with mathematical precision as to measurements or technical accuracy of expression, the locator was required to so describe the claim that the boundaries could be readily traced, and that a person of reasonable intelligence could, by aid of the directions when taken with the markings upon the ground, find the claim and run its lines; hence where the description is so erroneous as to be delusive and misleading, as when the declaratory statement and the markings do not even approximately agree as to the general shape of the claim or as to any point, direction or distance, the location is void.—*Leveridge v. Hennessy*, 58.

Same—Misleading Description—When Location Void.

2. *Held*, under the rule declared in paragraph 2, *supra*, that where the descriptions found in a declaratory statement, though suggesting a rectangle lying north and south, were such that one taking them and proceeding from the northern corners according to the directions given, would miss one of the southern corners by over 500 and the other by over 800 feet, and find the south line not only over 100 feet farther from the point of discovery but also some 432 feet shorter than called for in the statement, the location was void.—*Leveridge v. Hennessy*, 58.

Same—Annual Representation Work—Default of Co-owner—Forfeiture—Notice—Administrators—Insufficiency.

3. Service of notice upon the administrator of the estate of one of several co-owners in an unpatented mining claim, to the effect that unless he should, within ninety days, pay his proportion of the amount expended by his co-owners in doing the annual representation work upon the claim, his interest would be declared forfeited

under the provisions of section 2324, United States Revised Statutes, was insufficient, said section requiring service upon the then actual co-owner,—in this instance the heirs of the intestate, and not the administrator.—O'Hanlon v. Ruby Gulch Mining Co., 65.

Same—Representation Work—Failure to Contribute Toward Payment of Expense—Statute of Forfeiture—Construction.

4. Section 2324, United States Revised Statutes, providing that the interest of one of several co-owners in a mining claim shall, upon due notice, become the property of his co-owners upon his failure to contribute his proportion of the expenditure incident to the doing of the annual representation work upon the claim, is one of forfeiture and must be strictly construed.—O'Hanlon v. Ruby Gulch Mining Co., 65.

Same—Laches—Abandonment—Evidence—Admissibility.

5. While evidence that the heirs of a delinquent co-owner in an unpatented mining claim had been made aware of the fact that the administrator of the estate of their intestate had been served with notice calling for contribution toward the payment of the cost of the annual representation work on the claim, under penalty of forfeiting "his interest" therein, was immaterial (see paragraph 3, *supra*), it was both competent and material, under the circumstances of the case, as tending to show laches on their part in asserting their claims to the interest declared forfeited, as well as an abandonment thereof.—O'Hanlon v. Ruby Gulch Mining Co., 65.

Same—Abandonment—Failure to Contribute to Cost of Representation Work.

6. Though one of several cotenants in a mining claim cannot by any course of conduct on his part abandon the claim so as to destroy the interests of his cotenants and cause it to revert to the government, he may abandon his own interest and should be held to have done so where, with knowledge that his cotenants have performed the annual representation work upon the claim and are developing it, he fails to contribute his proportion of the expense and shows by his conduct that he has renounced his right, reasserting it only after development has shown the claim to be valuable.—O'Hanlon v. Ruby Gulch Mining Co., 65.

Same—Ouster of Cotenant—Remedies.

7. While a cotenant who has been excluded from a mining claim may bring an adverse suit to have his rights determined, so that the patent will convey directly to him whatever interest he may have, he is not bound to do so, but may wait until the patent proceedings are concluded, and then have the patentee declared a trustee for him to the extent of his interest.—O'Hanlon v. Ruby Gulch Mining Co., 65.

Same—Quieting Title—Ejectment—When Proper Remedy.

8. The remedy of one claiming to have been wrongfully ousted from a mining claim then in possession of defendant who asserts an adverse claim is an action in ejectment and not one to quiet title under section 6870, Revised Codes, which confers power upon courts of equity to entertain actions in which the defendant is asserting an adverse claim while the plaintiff is in possession, and actions in which neither plaintiff nor defendant is in possession, and the latter is asserting the adverse claim.—O'Hanlon v. Ruby Gulch Mining Co., 65.

MISJOINDER.

Of causes of action in justice's court,—see Pleading and Practice, 6.

Of parties defendant in water right suit,—see Water and Water Rights, 5.

MORTGAGES.

See Real Property, 1, 2.

MOTIONS.

To strike testimony, when refusal not error,—see Appeal and Error.

NEGLIGENCE.

See Personal Injuries.

NEW COUNTIES.

See Counties.

NEW TRIAL.

Excessive verdict,—see Verdicts, 7.

Discretion—Review.

1. *Quære*: Must the ruling of a district judge, called in upon a motion for new trial, be tested by the same standard of discretion as would be applied to that of the judge who tried the case if he had ruled thereon? (See *Gibson v. Morris Bank*, decided 7, 1914, 49 Mont. —, 140 Pac. 76.)—*Leveridge v. Hennessey*,

Discretion.

2. Where the conclusion of the trial court in an action to quiet title to a portion of a mining claim in apparent conflict with another action was supported by the decisive preponderance of the evidence, there was not any room for discretion in the district judge in to determine a motion for new trial, and the granting of the motion was therefore error.—*Leveridge v. Hennessey*, 58.

Order Granting—Affirmance, When.

3. An order granting a new trial which does not indicate upon what of several grounds assigned it was based, will be affirmed if justified upon any one of them.—*O'Hanlon v. Ruby Gulch Mining Co.* *Wallace v. Chicago M. & P. S. Ry. Co.*, 427; *Scott v. Waggoner*.

Discretion—Conflicting Evidence.

4. Where the evidence is in substantial conflict, the supreme court is not justified in holding that the trial court abused its discretion in refusing a new trial merely because, as it is made to appear from the transcript, the evidence seems to preponderate against the verdict.—*Lizott v. Big Blackfoot Milling Co.*, 171; *Western M. S. Co. v. Melzner*, 174.

When not to be Granted.

5. The solution of questions of fact being primarily a matter for the jury, a new trial asked for on the ground of the insufficiency of the evidence to support the verdict should be granted only for cogent and convincing.—*Western M. S. Co. v. Melzner*, 174.

New Trial Order—When Upheld on Appeal.

6. The rule that an order granting a new trial will be upheld on appeal only if it be justified upon any ground of the motion is applicable where the order is a general one, not disclosing the particular grounds upon which the court acted, or to a case where the provisions of the Revised Codes, are invoked.—*Harrington v. Butte Miner* (1914).

Notice of Intention—Record on Appeal.

In the absence from the record of a copy of the notice of intention to move for a new trial, the supreme court may not pass upon the merits of the motion.—*Canning v. Fried*, 560.

NOTICE OF APPEAL.

From justices' to district courts,—see Justices of the Peace, 3.
Sufficiency,—see Appeal and Error, 16.

OBJECTIONS.

To evidence—Repetition not necessary, when,—see Pleading and Practice, 25.

OFFER OF PROOF.

When rejection proper,—see Evidence, 8.

OFFICE AND OFFICERS.

Presumption that official duty has been performed,—see Convicts, 1.

Vacancies.

1. An existing office without any incumbent is vacant, whether it be a new one or an old one.—Great Falls & Teton County Ry. Co. v. Ganong, 54.

Same.

2. An office newly created becomes *ipso facto* vacant in its creation. Great Falls & Teton County Ry. Co. v. Ganong, 54.

OPTIONS.

See Real Property, 1.

OUSTER.

Of co-owner in mining claim—Remedies,—see Mines and Mining Claims, 7.

PARTNERSHIP.

Actions at Law Between Members—When not Maintainable.

1. One partner cannot, prior to a settlement and accounting, sue his copartner at law with reference to partnership transactions.—Goldsmith, Exr., v. Murray, 337.

PAYMENT.

Out of special fund,—see Contracts, 2.

PERSONAL INJURIES.

Master and Servant—Contributory Negligence—Complaint—Sufficiency.

1. Allegations of complaint in a personal injury action *held* not to bring the pleading within the rule that where it appears that plaintiff's own act was a proximate cause of his injury, facts must be alleged showing his freedom from negligence in acting as he did when injured.—Michalsky v. Centennial Brewing Co., 1.

Same—Release—Tender—Pleading.

2. Where plaintiff in a personal injury action alleged in his reply that if, as set up in the answer, he signed a writing releasing defendant from any liability in consideration of \$50, he did so at a time when he was under the influence of opiates and incapable of assent, he may not be said to have been seeking a rescission of the contract of release, so as to make it incumbent upon him to make a more definite tender of the amount said to have been received by him, than he did when he averred that "if the said money was paid for such purpose, he now offers and tenders to defendant the return of said sum."—Michalsky v. Centennial Brewing Co., 1.

Same—Evidence—Weight for Jury.

3. Plaintiff's evidence, though unsupported and opposed by the statements of a large number of defendant company's witnesses, held sufficient, if credited by the jury, to support a verdict in his behalf.—*Michalsky v. Centennial Brewing Co.*, 1.

Same—Negligence in Several Particulars—Proof.

4. Plaintiff who charges negligence in several particulars need not sustain the charge as to all; if actionable negligence is shown in any one of the respects alleged, it is sufficient.—*Michalsky v. Centennial Brewing Co.*, 1.

Same—In Service of Master, When.

5. Plaintiff, an employee in and about a brewery, who had been directed to assist in loading beer kegs and lend a hand as required, at the time he was injured was engaged in the service of his master when at the request of a teamster he picked up a pot of paste needed to restore a stamp on a keg before shipping.—*Michalsky v. Centennial Brewing Co.*, 1.

Same—Discovery of Danger—Duty of Servant—Instructions.

6. A workman, when ordered from one part of the work to another, not being permitted to stop, examine and experiment for himself in order to ascertain if the place assigned to him is a safe one, an instruction that it was the duty of plaintiff to apprise himself of any danger which he could or ought to have discovered by proper examination, was properly refused.—*Michalsky v. Centennial Brewing Co.*, 1.

Same—Jury—Inspection of Premises—Presumptions.

7. Where, at the request of defendants (appellants), the jury were taken to view machinery, then said by the former to be in the same condition as at the time of the accident, it will be presumed on appeal, in the absence of evidence to the contrary, that, in returning a verdict in favor of plaintiff, they found the machinery to have been unguarded as charged by plaintiff.—*Michalsky v. Centennial Brewing Co.*, 1.

Same—Special Interrogatories—Discretion.

8. The submission of special interrogatories in personal injury actions, such as whether the place at which the accident occurred was reasonably well lighted, etc., though commendable practice, is nevertheless within the discretion of the trial court, and therefore refusal to submit is not subject to correction on appeal.—*Michalsky v. Centennial Brewing Co.*, 1.

Same—Excessive Verdicts.

9. Where plaintiff, by reason of a personal injury, sustained an incurable deformity and suffered permanent impairment of earning capacity as a laborer, a verdict for \$7,150, held not excessive.—*Michalsky v. Centennial Brewing Co.*, 1.

Negligence—Pleading and Proof.

10. Plaintiff in a personal injury action need not prove negligence in all the particulars charged in his complaint, evidence tending to establish negligence in any of the particulars alleged to have caused his injury being sufficient to take the case to the jury.—*Westlake v. Keating Gold Mining Co.*, 120.

Same—Violation of Statute—Negligence *Per Se*.

11. The violation of a specific duty imposed by statute, such as the storing of dynamite in a mine in quantity greater than 3,000 pounds (Rev. Codes, sec. 8546), or storing it at a place therein where, should it accidentally explode, escape by the mine workmen would be cut off, is negligence *per se*.—*Westlake v. Keating Gold Mining Co.*, 120.

Same—Evidence—Negligence—Causal Connection With Injury.

12. The requirement of the rule that, before negligence can become a basis of recovery for personal injuries, a causal connection must be shown between it and them, *held* to have been satisfied by the showing of plaintiff, who sought damages sustained by reason of an explosion of a quantity of dynamite stored in a mine contrary to statutory provision, to the effect that an excessive quantity was kept in the mine, that it exploded and that he was injured.—*Westlake v. Keating Gold Mining Co.*, 120.

Same—Absence of Causal Connection.

13. Plaintiff who, at the time of the explosion of a quantity of dynamite stored at a place in a mine contrary to the provisions of section 8546, Revised Codes, was not so situated as to have his escape from the mine cut off by it, could not charge as an act of negligence the storage of the powder in a place where, in case of accidental discharge, escape by those working in the mine would be cut off, since the causal connection between his injuries and the stoppage of egress from the mine was lacking.—*Westlake v. Keating Gold Mining Co.*, 120.

Same—Safe Place to Work—Complaint—Sufficiency.

14. The allegation that defendant mining company had negligently stored dynamite at a place where, should an explosion occur, the lives of persons working in the mine would be imperiled, *held* the equivalent of a charge of negligence on the part of the master in failing to furnish his employee a reasonably safe place in which to work.—*Westlake v. Keating Gold Mining Co.*, 120.

Same—Explosives—Appliances—Negligent Method—Evidence—Sufficiency.

15. Evidence *held* sufficient to justify submission to the jury of the question whether or not defendant had, in the selection of electricity for thawing dynamite, adopted a reasonably safe method, as well as to sustain the charge of negligence based on the overheating of the explosives through the means employed.—*Westlake v. Keating Gold Mining Co.*, 120.

Same—Appliances Used Elsewhere—Evidence Inadmissible, When.

16. Where the charge of negligence on the part of defendant mine owner was based, not upon the use of electricity in thawing dynamite but upon the manner and extent in which it was employed, evidence that it was not elsewhere resorted to as a thawing agency, was properly excluded.—*Westlake v. Keating Gold Mining Co.*, 120.

Same—Safety of Appliance—Expert Testimony—Admissibility.

17. The question whether the use of electricity for thawing dynamite as employed by defendant was a safe one was properly one for expert testimony.—*Westlake v. Keating Gold Mining Co.*, 120.

Same—Dynamite—Cause of Explosion—Expert Testimony—Admissibility.

18. Evidence sought to be elicited from miners who, though not claiming any precise knowledge of the constituents of dynamite, had handled it and knew its properties from a practical point of view, tending to show that the bursting of an electric light bulb may bring about an explosion of dynamite being heated in a box by means of incandescent electric lights, was admissible.—*Westlake v. Keating Gold Mining Co.*, 120.

Same—Assumption of Risk.

19. Under the rule that to make out a case of assumption of risk the injured party must have known of and appreciated the danger from which he suffered, *held* that plaintiff assumed the risk of all dangers incident to the dynamite stored in the mine as he saw them, and not those due to a negligent method of thawing pursued out

of his right and with which he had nothing to do.—*West Keating Gold Mining Co.*, 129.

Same—Charges of Negligence—Pleading and Proof.

22. Where the particulars of what defendant's negligence is to have resulted in plaintiff's personal injuries are not given in the complaint, it is necessary to state in the answer that defendant is not negligent as charged, but that defendant is guilty of the fault which caused the injury, and it is sufficient to take the case to the jury.—*Miner v. Sutton's New Theater Co.*, 127.

Same—Safe Place to Work—Burden of Proof.

23. Under a charge that plaintiff's injuries were caused by defendant's failure to furnish him with a safe place to work, it is proper to require the plaintiff to prove a certain appearance. It was held that plaintiff is entitled to establish the fact that he was in the car at the instant at the time of the accident, that defendant's failure to furnish the appearance was negligent, and that because of negligence the injuries occurred.—*Miner v. Sutton's New Theater Co.*, 127.

Same—Fellow-servants—Injury to a Fellow-servant—Permissible Cause.

24. Evidence to show that the method employed by defendant in the management of the work was a usual and reasonable one, and that the injuries were caused by the negligence of defendant's fellow-servants, is admissible, but the act of the fellow-servants.—*Miner v. Sutton's New Theater Co.*, 127.

Same—Pleading and Proof—Immaterial Variance.

25. A variance between an answer charging negligence and the complaint because of the difference in the manner of describing the fellow-servants is immaterial where such a charged knowledge of the facts because of the negligence of the fellow-servants is within a general statement of the complaint, and the facts are within a general statement of the complaint, and the facts are within a general statement of the complaint.—*Miner v. Sutton's New Theater Co.*, 127.

Same—Injury to a Fellow-servant—Duty of Master.

26. Defendant master was not guilty of the ordinary negligence, but was not guilty of the ordinary negligence of the fellow-servants to see that they did not become negligent by reason of his negligence.—*Miner v. Sutton's New Theater Co.*, 127.

Same—Assault on a Risk—Instructions—Perjury Refusal.

27. An instruction in the case of a person who is injured while working on a risk, that the person is to be charged therewith, have a right to refuse to answer the question as to his fault, may properly be refused.—*Miner v. Sutton's New Theater Co.*, 127.

Same—Injury to a Risk—Negligence of Fellow-servants—Pleading and Proof.

28. Where the plaintiff's injury from defendant's own negligence, negligence of risk and negligence of fellow-servants, the negligence of the fellow-servants may be pleaded to be available to defend.—*Miner v. Sutton's New Theater Co.*, 127.

Same.

29. Where the plaintiff's injury from defendant's own negligence, negligence of risk and negligence of fellow-servants, the negligence of the fellow-servants may be pleaded to be available to defend.—*Miner v. Sutton's New Theater Co.*, 127.

Same—Instructions—"Losses" or "Damages"—Harmless Error.

28. An instruction telling the jury that the employer must indemnify his employee for the "losses" caused by the former's want of ordinary care, *held* not so meaningless as to be confusing, the term "losses" evidently being used in the sense of legal damages.—*Mosher v. Sutton's New Theater Co.*, 137.

Same—Verdict—When not Against Law.

29. Where negligence resulting in personal injury was charged in two particulars, only one of which was supported by the evidence, and the court instructed the jury to find for the defendant if negligence in the particular not proven had not been shown, a verdict for plaintiff, general in character, was not open to the charge that it was against law.—*Mosher v. Sutton's New Theater Co.*, 137.

Same—Credibility of Witness—Province of Jury.

30. The credibility of witnesses in a personal injury action is a matter within the exclusive province of the jury; hence the contention of defendant on appeal from the judgment and order denying a new trial, that the jury should have discredited plaintiff and his witnesses and believed those of defendant is of no avail.—*Mosher v. Sutton's New Theater Co.*, 137.

Railroads—Last Clear Chance Doctrine—When Applicable.

31. A case calling for the application of the last clear chance doctrine, in a personal injury action, must embody the following three elements which must concur: (1) The exposed condition brought about by the negligence of the person injured; (2) the actual discovery of the defendant of the perilous situation of the person; and (3) defendant's failure to thereafter use ordinary care to avert the injury; hence the doctrine was inapplicable where the first requisite, *i. e.*, antecedent negligence on the part of the injured person, was lacking.—*Dahmer v. Northern Pac. Ry. Co.*, 152.

Same.

32. The rule of the last clear chance as stated in paragraph 31, *supra*, does not impose upon the defendant in a personal injury action the obligation to maintain a lookout at all times to discover anyone who may be in a position of peril, but includes those cases in which actual discovery of the peril is a just inference from the evidence, though denied by defendant, as well as those in which the discovery is admitted, or not denied, and liability is sought to be avoided on other grounds.—*Dahmer v. Northern Pac. Ry. Co.*, 152.

Same—Stations—Duty to Maintain Lookout.

33. A railway company must, under penalty of liability for resultant injury because of failure of duty in this regard, use special care and watchfulness in the running of its trains when approaching points along its line where the presence of persons, especially in large numbers, may reasonably be anticipated.—*Dahmer v. Northern Pac. Ry. Co.*, 152.

Same—Technical Trespassers—Duty of Railways.

34. Notwithstanding one who goes upon the premises of a railway company at its invitation to transact business with it or to meet a person on an incoming train, is technically a trespasser if he gets upon the track at places at which crossings are not provided, the company must use reasonable precaution to avoid injuring him.—*Dahmer v. Northern Pac. Ry. Co.*, 152.

Same—Railways may Run Through-trains—Notice to Public.

35. A railway company may run through-trains which stop only at principal stations, and persons desiring to know when and where such trains stop must ascertain the information from its agents, and conduct themselves accordingly, it not being incumbent upon a

carrier to bring home to the public notice of such matters.—*Dahmer v. Northern Pac. Ry. Co.*, 152.

Same—Limitation of Duty to Keep Lookout.

36. The duty of a railroad company to keep a lookout for persons when running a through-train past stations at remote and out of the way places must be measured by the character of such places, the time of the day or night when they are reached, and other like circumstances.—*Dahmer v. Northern Pac. Ry. Co.*, 152.

Same.

37. Held, under the rule declared in paragraph 36, *supra*, that defendant railway company was under no greater obligation to keep a lookout at a station which was passed by one of its through-trains at an early hour in the morning when it could not reasonably be anticipated that persons were present to become passengers or engage in the transaction of business with its agent, than it was in the open country or at any other place at which persons were not expected to be.—*Dahmer v. Northern Pac. Ry. Co.*, 152.

Same—Discovery of Peril—Evidence—Insufficiency.

38. Evidence held insufficient to justify the conclusion that defendant locomotive engineer discovered the position of plaintiff—who, while waiting at about 1 o'clock in the morning for the arrival of a passenger train at a small station where it was not scheduled to stop, and which he had no reason to think would stop other than information to that effect by a friend, had been beaten into partial insensibility by thugs and fallen upon the tracks, where he was run over while endeavoring to crawl to safety—in time to avoid injuring him.—*Dahmer v. Northern Pac. Ry. Co.*, 152.

Master and Servant—Conclusiveness of Verdict—Evidence—Weight.

39. Under the rule that a verdict based upon evidence presenting a substantial conflict, which was adopted by the trial court upon a motion for a new trial, is not subject to review on appeal, held, that the fact that plaintiff's unsupported statement relative to the existence of a defect in a pathway provided for him by defendant in its logging operations, was directly contradicted by a number of defendant's witnesses, did not result in rendering his evidence so insufficient as not to support a verdict in his favor, since the effect and value of evidence is a matter exclusively for the jury, who are not bound to decide in conformity with the declarations of any number of witnesses as against a less number.—*Lizott v. Big Blackfoot Milling Co.*, 171.

Master and Servant—Independent Contractors—Evidence.

40. Evidence in an action against a city water company for injuries to a laborer by the caving of a ditch, held sufficient to furnish a basis for an inference that plaintiff was at the time of the accident in the employ of defendant company, and not of its codefendant, an alleged independent contractor.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Independent Contractors—Defense—General Denial.

41. The defense that an independent contractor was responsible for work during the course of which plaintiff sustained injuries, is available under a general denial, and need not be established by a preponderance of the evidence, the burden of proving the contrary being on plaintiff.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Negligence—Causal Connection—Evidence—Insufficiency.

42. Evidence held insufficient to meet the requirement of the rule that before defendant in a personal injury action can be declared liable, plaintiff must have proved not only the injury but also a

causal connection between it and defendant's negligence.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Safe Place—Exception to Rule—Assumption of Risk.

43. One who enters upon employment, such as mining or the digging of trenches, assumes the risk of the dangers incident to the making of the place which becomes dangerous as the work progresses, or the making of a dangerous place safe; the doctrine imposing upon the master the duty to furnish his servant a safe place in which to work not applying in such cases.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Proximate Cause—Nature of Proof.

44. Though the proximate or efficient cause of a personal injury may be shown by indirect evidence, it must be of such character that it not only tends affirmatively to show that the accident was due to it, but also to exclude any other theory of its happening.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Independent Contractors—When Question for Jury or Court.

45. The question whether a written contract which clearly expresses all the undertakings of the parties, or an oral one presenting no controversy as to its terms, created the relation of master and servant, or that of employer and independent contractor, is one for the court; otherwise it is one to be determined by the jury under proper instructions.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Assumption of Risk—Jury Question.

46. Whether plaintiff, a laborer engaged in digging a trench, assumed the risk incident to his employment, *held* to have been properly submitted, upon the theory of negligence based on the failure of defendant to make safe the completed portion of the trench.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Independent Contractors—Payment of Wages—Evidence—Cross-examination—Proper Exclusion.

47. Plaintiff having testified that his wages had been paid through check by one H., alleged by defendant corporation to have been an independent contractor, an objection to the question asked him on cross-examination whether he knew for whom he was working was properly sustained as immaterial, the issue being, who was in fact his employer and not his knowledge as to the relation existing between H., and the company.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Independent Contractors—Evidence—Admissibility.

48. Plaintiff's evidence that he saw defendant company's foreman on the ditch line the day before the accident, and that the latter had ordered the person in charge to keep the crew at work at a certain point, was admissible as tending to show how far the company retained control of the work, it being its contention that it was being done by its codefendant, an independent contractor.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Method of Work—Safety—Assumption of Facts—When Proper.

49. While the court in its instructions might have assumed that "shearing" the lips of a trench was a reasonable and proper method of making it safe, in view of the fact that the evidence in this regard was uncontradicted and accorded with common observation and experience, its refusal to do so did not result in prejudice to defendant.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Codefendants—Arbitrary Verdict as to One—Validity.

50. Where, in a personal injury action brought jointly against the employer and his agent or servant, the jury arbitrarily acquits the

latter though the wrong complained of was done through his negligence, the verdict against the principal will nevertheless be allowed to stand.—*De Sandro v. Missoula Light & Water Co.*, 226.

Same—Cities and Towns—Public Service Corporations—Validity of Contracts.

51. *Quære*: May a water company operating under a franchise from a city, let a contract for the digging and refilling of trenches so as to relieve itself from liability to the contractor's employees for damages on account of injuries sustained because of his negligence in doing the work?—*De Sandro v. Missoula Light & Water Co.*, 226.

Mines and Mining—Death—Nature of Right of Action.

52. *Held* that, since the right of action given by section 6484, Revised Codes, to the heirs or personal representatives of one whose death was caused by the wrongful act of another, though distinct from that which the deceased would have had in case he had only been injured, is the same in character and dependent upon the same facts, the heirs of a miner who himself was responsible for his death because of his violation of a rule of defendant company requiring him to close the doors of a safety cage while being hoisted to the surface, were barred of recovery; deceased could not have maintained the action because of his contributory negligence, and therefore his

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Same—Duty of Road Supervisors—Instructions—Proper Refusal.

57. It being the duty of road supervisors in the absence of funds to repair a defect in a public road, to give suitable warning, or, if necessary, to barricade the defective portion, an instruction which would have told the jury that such an officer was not liable for personal injuries occasioned by a washout if funds were not available for repair work, was properly refused.—*Smith v. Zimmer*, 332.

Negligence—Proximate Cause.

58. It is only such negligent acts as bear a direct, proximate and causal relation to an injury that give a cause of action.—*Wallace v. Chicago, M. & P. S. Ry. Co.*, 427.

Same.

59. The "proximate cause" of an injury is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred.—*Wallace v. Chicago, M. & P. S. Ry. Co.*, 427.

Same—Causal Connection Between Injury and Negligence.

60. Before negligence can become the basis of recovery in a personal injury action, a causal connection must be shown between it and the injury complained of.—*Wallace v. Chicago, M. & P. S. Ry. Co.*, 427.

Same—Proximate Cause—Proof.

61. While the efficient cause of a personal injury may be proved by indirect evidence, the circumstances must be such as to tend affirmatively to show it, to the exclusion of any theory inconsistent therewith.—*Wallace v. Chicago, M. & P. S. Ry. Co.*, 427.

Master and Servant—Tools and Appliances—Duty of Master.

62. An employer is not an insurer, and is not required to select the safest appliances nor the best method for their operation, but only to furnish the appliances in general use for the same purpose, and operated in the same way, by reasonably prudent and careful men under like circumstances.—*Wallace v. Chicago, M. & P. S. Ry. Co.*, 427.

Same—Causal Connection Between Injury and Negligence—Evidence—Insufficiency.

63. Where the only ground of negligence, among others alleged by plaintiff, a machinist's helper, and sustained by the evidence, which bore a causal connection with his personal injury, was the careless removal of a block of wood from in front of a drive-wheel about to be placed on a lathe, and not defendant company's failure to supply reasonably safe and suitable appliances for doing the work, a verdict for plaintiff under an instruction that defendant should be held liable if the injury was proximately caused by a want of safe and suitable appliances, was properly set aside and a new trial granted.—*Wallace v. Chicago, M. & P. S. Ry. Co.*, 427.

Cities and Towns—Defective Streets—Duty of Defendant.

64. When the public streets of a city or town are rendered unsafe by reason of repairs being made therein, or have become defective from any cause, and the authorities have or should have notice of the condition, the duty to warn the public by lights or barriers arises, the traveler not being bound to make investigation or chargeable with negligence if he fails to do so.—*Snyder v. Town of Chinook*, 484.

Same—Evidence—Improper Cross-examination.

65. Where a witness on his direct examination had testified as to the physical condition of a street in which he had left it the day preceding the night on which plaintiff was injured, with relation to

the placing of lights or barriers, a question on cross-examination touching his previous experience in road work was improper.—*Snyder v. Town of Chinook*, 454.

Same—Instructions—Harmless Error.

66. Microscopic error in the giving of instructions touching the amount which the jury might award for loss of earning capacity in a personal injury action will not work a reversal of the judgment.—*Snyder v. Town of Chinook*, 454.

PLEADING AND PRACTICE.

Personal Injuries—Contributory Negligence—Complaint—Sufficiency.

1. Allegations of complaint in a personal injury action *held* not to bring the pleading within the rule that where it appears that plaintiff's own act was a proximate cause of his injury, facts must be alleged showing his freedom from negligence in acting as he did when injured. *Michalsky v. Centennial Brewing Co.*, 1.

Pleading—Implication—Construction.

2. As against an attack for lack of substance, whatever is necessarily implied in, or reasonably to be inferred from, an allegation of a pleading is to be taken as directly averred.—*Gauss v. Trump, Admx.*, 92.

Executors and Administrators—Claims Against Estate—Presentation—Pleadings—Conclusions.

3. An averment in plaintiff's complaint against an administratrix to recover the reasonable value of services rendered her intestate, that on a certain day and "before the time for presentation of claims against the said estate had expired" he had presented his claim to the defendant, *etc.*, *held* not open to the objection that, as to the fact that the claim had been presented within the time prescribed in the notice to creditors of the estate, it stated a mere conclusion of law; *held*, further that in the absence of a special demurrer or motion, such an inferential allegation will support proof.—*Gauss v. Trump, Admx.*, 92.

Personal Injuries—Master and Servant—Safe Place to Work—Complaint—Sufficiency.

4. The allegation that defendant mining company had negligently stored dynamite at a place where, should an explosion occur, the lives of persons working in the mine would be imperiled, *held* the equivalent of a charge of negligence on the part of the master in failing to furnish his employee a reasonably safe place in which to work.—*Westlake v. Keating Gold Min. Co.*, 120.

Same—Assumption of Risk—Negligence of Fellow-servants—Pleading and Proof.

5. Unless they affirmatively appear from plaintiff's own pleadings or proof, assumption of risk and negligence of fellow-servants, being matters of defense, must be pleaded to be available to defendant.—*Mosher v. Sutton's New Theater Co.*, 137.

Causes of Action—Misjoinder—Demurrer.

6. So long as causes of action joined in one complaint are of such a character that a justice's court has jurisdiction of each of them, and the aggregate of the demands does not exceed \$300, a demurrer for misjoinder does not lie in such a court.—*Reynolds v. Smith*, 149.

Probate Proceedings—Technical Rules of Pleading—Immateriality.

7. In a proceeding in which one primarily entitled to the administration of an estate seeks the revocation of letters issued to his nominee, a strict technical observance of the rules of pleading in the preparation of the complaint was not required, it appearing at the hearing that

defendant was not taken by surprise but was fully informed of the nature and scope of the charges made.—In re Blackburn's Estate, 179.

Contracts—Preventing Completion—Complaint—Insufficiency.

8. Complaint in an action to recover on a contract which plaintiff claimed he was prevented by defendant from fully performing, *held* insufficient for lack of allegation that defendant's interference was wrongful, or a showing that his failure to complete the contract was excusable.—McFarland v. Welch, 196.

Same—Argumentative Denial—Reply.

9. The answer of defendant in claim and delivery setting forth affirmatively the reasons why title to the cattle in controversy was in him and not in plaintiff, was an argumentative denial; hence, failure to reply did not constitute an admission of the truth of the matters stated so as to justify the exclusion of evidence offered in support thereof.—Cuerth v. Arbogast, 209.

Quieting Title—Answer—Adverse Possession—Failure to Reply—Judgment on Pleadings.

10. Allegation of the answer, in an action to quiet title, setting up title by prescription "to the lands described in the complaint herein," required a reply, in default of which defendant was entitled to judgment on the pleadings.—Anaconda Copper Mining Co. v. Thomas, 222.

Same—Equity—Pleadings—Prayer not Conclusive.

11. In a suit in equity the pleader is not concluded by his prayer, nor by the form of his pleading; hence, defendant, in an action to quiet title, though not asking for affirmative relief in his answer setting up title by prescription in himself, which allegation stood admitted by failure to reply, was nevertheless entitled thereto, and, the pleading having been sufficient in form, judgment on the pleadings was proper. Anaconda Copper Mining Co. v. Thomas, 222.

Same—Adverse Possession—Admission by Failure to Reply—Effect.

12. By failure to reply to a claim of adverse possession for the statutory period, plaintiff admitted that the lands in controversy were such as to permit of possession of the character alleged by defendant; and was estopped to assert on appeal that they were unsurveyed and therefore not subject to such possession.—Anaconda Copper Mining Co. v. Thomas, 222.

Personal Injuries—Independent Contractors—Defense—General Denial.

13. The defense that an independent contractor was responsible for work during the course of which plaintiff sustained injuries, is available under a general denial, and need not be established by a preponderance of the evidence, the burden of proving the contrary being on plaintiff.—De Sandro v. Missoula L. & W. Co., 226.

Malicious Prosecution—Mental Suffering—Damages Recoverable.

14. In an action for malicious prosecution, plaintiff need not, to enable him to recover compensatory damages for mental suffering, specially plead damages in this regard.—Grorud v. Lossel, 274.

Answer—New Matter—Reply.

15. The "new matter" in an answer which, under section 6560, Revised Codes, calls for a reply is such only as calls for a defense or a counterclaim, anything else not being new matter within the meaning of the Practice Act.—Stephens v. Conley, 352.

Same.

16. If the facts stated in the answer can be proved under a general denial, they do not constitute new matter within the meaning of the Practice Act, and failure to reply does not amount to an admission of the truth of the matters stated.—Stephens v. Conley, 352.

General Verdict—Issues—Evidence.

17. Under a general verdict, the defendant may introduce as much evidence in support of the facts which the plaintiff is bound to establish as would be sufficient to sustain the verdict. — *Conover v. Conroy*, 352.

Argumentative Verdict—Error—Presumption.

18. It is an error for the jury to introduce evidence as to the merits of the case, or to introduce evidence as to the facts of the case, or to introduce evidence as to the facts of the case, or to introduce evidence as to the facts of the case. — *Conover v. Conroy*, 352.

Presumption—Inference—Inference—Presumption of Adversity.

19. A presumption of adversity is raised when a material fact can be proved by the defendant, and the presumption is the presumption of a party. — *Conover v. Conroy*, 352.

Presumption—Presumption—Verdict.

20. A presumption of adversity is raised when a material fact can be proved by the defendant, and the presumption is the presumption of a party. — *Conover v. Conroy*, 352.

Presumption—Presumption—Verdict.

21. A presumption of adversity is raised when a material fact can be proved by the defendant, and the presumption is the presumption of a party. — *Conover v. Conroy*, 352.

Presumption—Presumption—Verdict.

22. A presumption of adversity is raised when a material fact can be proved by the defendant, and the presumption is the presumption of a party. — *Conover v. Conroy*, 352.

Presumption—Presumption—Verdict—Presumption.

23. A presumption of adversity is raised when a material fact can be proved by the defendant, and the presumption is the presumption of a party. — *Conover v. Conroy*, 352.

Presumption—Presumption.

24. A presumption of adversity is raised when a material fact can be proved by the defendant, and the presumption is the presumption of a party. — *Conover v. Conroy*, 352.

Presumption—Presumption—Verdict—Presumption.

25. A presumption of adversity is raised when a material fact can be proved by the defendant, and the presumption is the presumption of a party. — *Conover v. Conroy*, 352.

PLEDGE.

Option and contract to purchase.—see Real Property, 1-3.

POWERS.

Of three departments of state government.—see Constitution, 5.

PRESUMPTION.

See Cities and Towns, 1-4; Quieting Title, 1-3.

PRESUMPTIONS.

See, also, Statutes and Statutory Construction, 2.

That official duty has been performed.—see Conviction, 1.

That trial court did not err.—see Appeal and Error, 22.

View of premises by jury.—Appeal.—see Jury, 1.

Malicious Process.—Probable Cause.—Malice.

1. Where the plaintiff is an actor for malicious process, prove both the want of probable cause and malice, in order to

prima facie case, the presence of the latter may be inferred by the jury where the absence of the former has been established.—*Grorud v. Lossl*, 274.

PRINCIPAL AND AGENT.

See Conversion, 1; Corporations.

PROBATE PROCEEDINGS.

See, also, Estates of Deceased Persons; Executors and Administrators.

Embezzling Assets of Estates—Order Requiring Disclosure Nonappealable.

1. An order requiring a person charged by an administrator with having concealed or disposed of assets of the estate represented by the latter, made after examination of the former pursuant to a citation issued in a proceeding instituted under sections 7505 and 7506, Revised Codes, to make disclosure as prayed, is not appealable.—*In re Robert's Estate*, 40.

PROHIBITION.

See, also, Cities and Towns, 13.

Does not lie, when,—see Intoxicating Liquors, 2.

PROSTITUTION.

Validity of "White Slave" Act,—see Criminal Law, 4.

PUBLIC LANDS.

Taxation of homestead and desert entries,—see Irrigation Districts, 3.

PUBLIC SCHOOLS.

Land grant for—Sale,—see School Lands.

QUANTUM MERUIT.

See Estates of Deceased Persons, 3.

QUIETING TITLE.

See, also, Mines and Mining, 8.

Answer—Adverse Possession—Failure to Reply—Judgment on Pleadings.

1. Allegations of the answer, in an action to quiet title, setting up title by prescription "to the lands described in the complaint herein," required a reply, in default of which defendant was entitled to judgment on the pleadings.—*Anaconda Copper Min. Co. v. Thomas*, 222.

Equity—Pleadings—Prayer not Conclusive.

2. In a suit in equity the pleader is not concluded by his prayer, nor by the form of his pleading; hence, defendant, in an action to quiet title, though not asking for affirmative relief in his answer setting up title by prescription in himself, which allegation stood admitted by failure to reply, was nevertheless entitled thereto, and, the pleading having been sufficient in form, judgment on the pleadings was proper. *Anaconda Copper Min. Co. v. Thomas*, 222.

Adverse Possession—Admission by Failure to Reply—Effect.

3. By failure to reply to a claim of adverse possession for the statutory period, plaintiff admitted that the lands in controversy were such as to permit of possession of the character alleged by defendant, and was estopped to assert on appeal that they were unsurveyed and therefore not subject to such possession.—*Anaconda Copper Min. Co. v. Thomas*, 222.

RAILROADS

See Articles 1, 2; Corporations 1; Eminent Domain 1-4; Personal Injury 31-33, 53-54; Torts 1-4; Water and Water Rights 2.

REAL PROPERTY.

Deeds—Restoration of record—Nature of error—see Torts 1.

Easements in land—see Torts 1.

Options—Purchase.

1. Where the holder of an option to purchase land had not paid any thing thereon in his own possession or any of them at the time he was sued as security for a loan he had not any interest in the land which he could mortgage and was the owner of a separate property which he could mortgage.—*King v. Santa River Dev. Co., 11, 47*.

Contract to Purchase—Assignment—Equitable Mortgage.

2. Where the assignor of a contract to purchase land had made part payment thereon and had not taken possession and had not taken title as equitable mortgage upon the realty, interest upon the assignment of the contract was not a mortgage and the assignor was not bound by the provisions.—*King v. Santa River Dev. Co., 47*.

Sale—Purchase.

3. The interest one has in a contract to purchase land, part payment on which he has made and if which he has taken possession, may be pledged as security for the payment of a note.—*King v. Santa River Dev. Co., 47*.

RECEIVERS.

Receiver Prudent Use—Evidence—Insolvency.

1. A mortgage company made an assignment of its property for the benefit of its creditors. E purchased the property from the assignor, conveying and conveying to E as trustee for the creditors, a mortgage as security, under the terms of which the proceeds were to be applied to a discharge of the claims of the creditors. Under the terms of said E had the right to sell the goods in the regular course of business being required, however, to make a weekly accounting to the trustee. Alleging breach of the terms of said mortgage, the trustee commenced suit against E to foreclose the mortgage, and asked that a receiver prudent use be appointed. Held, that refusal to appoint a receiver was proper, it appearing that the proceeds of sales were being applied to the purpose provided in the mortgage and that the creditors were not suffering or likely to suffer any substantial injury before final decree.—*Brown v. E. H. Harper-Engley Co., 17*.

Showing Necessary to Justify Appointment.

2. A receiver prudent use should only be appointed upon a strong showing that such officer is necessary to preserve the property in controversy pending an adjustment of the ultimate rights of the parties.—*Brown v. E. H. Harper-Engley Co., 17*.

Wrongful Appointment—Action on Bond—Pleading and Proof.

3. Held, that to warrant recovery on a bond given pursuant to section 6711, Revised Codes, in a suit in which the appointment of a receiver was asked to take charge of the personal property of an alleged partnership, plaintiff was not required to allege and prove a specific adjudication in the primary suit that the appointment of the receiver was procured wrongfully, either by or without sufficient cause, or that the receivership was formally vacated in response to a motion to that effect; held, further, that such a adjudication may be implied from the final decree adjudging the ownership of the property in the defendant,—

plaintiff in the action on the bond.—Lyon v. United States Fidelity & Guaranty Co., 591.

Nature of Remedy.

4. Receivership is an extraordinary remedy of ancillary character, the chief reason for its allowance being to husband the property in litigation for the benefit of the person who may ultimately be found entitled thereto.—Lyon v. United States Fidelity & Guaranty Co., 591.

Scope of Order.

5. The appointment of, or refusal to appoint, a receiver pending determination of an action, does not conclude either of the parties upon the ultimate question involved.—Lyon v. United States Fidelity & Guaranty Co., 591.

Action on Bond—Estoppel.

6. Plaintiff was not estopped to question the propriety of the appointment of a receiver, by his failure to appeal from an order refusing to vacate the receivership.—Lyon v. United States Fidelity & Guaranty Co., 591.

Same—Pleadings—Estoppel.

7. Where plaintiff alleged the value of partnership property involved in an action in which he asked for the appointment of a receiver, to be of the value of \$4,000, and defendant denied that it was worth more than \$1,500, the latter was not estopped to assert, in an action on the receiver's bond, that the property was of a greater value than that claimed by him in the first action.—Lyon v. United States Fidelity & Guaranty Co., 591.

Same—Damages—Evidence—Loss of Property.

8. Evidence of the value of personal property, either lost or destroyed while in charge of a receiver, was properly admitted as an element of the damages flowing from the wrongful procurement of his appointment. Lyon v. United States Fidelity & Guaranty Co., 591.

RECORD ON APPEAL.

See Appeal and Error, 13, 19, 21a, 24, 25.

RELEASE.

See Personal Injuries, 2.

RES ADJUDICATA.

See, also, Judgments, 2.

Evidence—Inadmissibility,—see Water and Water Rights, 4.

ROAD SUPERVISORS.

Defects in highways—When personally liable for personal injuries,—see Personal Injuries, 56, 57.

RULES.

Of supreme court—Record in equity cases,—see Appeal and Error, 13.

SCHOOL LANDS.

Federal Grant—Trust—State Board of Land Commissioners—Nature of Duty.

1. The land grant made by the federal government to the state for school purposes constitutes a public trust, which the state board of land commissioners must so administer as to secure the largest measure of

legitimate advantage to the state.—State ex rel. Gravelly v. Stewart, 347.

Sales—Approval and Confirmation—Discretion—Mandamus.

2. In determining whether it shall or shall not confirm a sale of state school lands, the state board of land commissioners acts quasi-judicially, and may not, in the absence of abuse of its discretion, be compelled by mandamus to confirm a sale made by the register at a price which the board deems inadequate.—State ex rel. Gravelly v. Stewart, 347.

Same—Not Complete Without Approval.

3. Bidders at sales of state school lands take the land bid in by them, with the knowledge that the sale is not complete, under section 42, Chapter 147, Laws of 1909, without the approval and confirmation of the state board of land commissioners, and that in its action on a particular sale it will be governed by the interests of the trust which it is charged to administer.—State ex rel. Gravelly v. Stewart, 347.

SHERIFFS.

Power to appoint court attendants,—see District Courts, 1.

SPECIAL IMPROVEMENTS.

Appointment of appraisers, when improper,—see Cities and Towns, 13.

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STATE BOARD OF LAND COMMISSIONERS.

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STATUTES AND STATUTORY CONSTRUCTION.

Validity of "White Slave" Act,—see Criminal Law, 4.

Articles—Chapters—Sections.

1. Articles of the same Chapter of the Codes, when dealing with same subject and not in conflict with each other, must be construed together.—*Brown v. Foster*, 114.

Same—Presumptions.

2. Under subdivision 3, section 3562, Revised Codes, the division of the Codes into Parts, Titles, Chapters, Articles and Sections, is a device for convenience, and no implication or presumption of a relative construction is to be drawn therefrom.—*Brown v. Foster*, 114.

Actions—Common Law—Abolition of Forms—Statutory Construction.

3. While the common-law forms of action have been abolished in Montana, the principles underlying them have not been changed, and a reference to both such forms and principles is frequently of aid in the construction of statutes.—*Maronen v. Anaconda C. M. Co.*, 249.

Constitution—Legislative Construction—Effect.

4. A construction for many years placed upon a constitutional provision by the legislature in enacting statutes is entitled to respectful consideration by courts.—*Northern Pac. Ry. Co. v. Mjelde, Co. Treasurer*, 287.

STOCK AND STOCKHOLDERS.

See Corporations.

STREETS AND HIGHWAYS.

See, also, Cities and Towns.

Public Highways—Definition—Statutes.

1. *Obiter*: By section 1337, Revised Codes (sec. 2600, Pol. Code, 11) those roads only are declared to be public highways which had been established by the public authorities or were recognized by them as such by general use by the public, or which had become such by prescription or adverse user at the time of its enactment.—*Barnard Realty Co. v. City of Butte*, 102.

TAXATION.

Of interest of settler in public land before final proof,—see Irrigation Districts, 3.

Estates in Land—Deeds—Reservation of Minerals.

1. *Held*, that the estate remaining in the Northern Pacific Railway Company by reason of clauses inserted in deeds to portions of the land granted to it by the government, which reserve "unto the grantor and his successors and assigns, forever, all mineral * * * including oil and gas as well as the use of the surface ground for exploration purposes, and all interest in real estate and therefore subject to taxation; *held*, further, that such interest does not constitute either a "mine" or a "mining claim" within the meaning of section 3, Article XII, of the Montana Constitution, providing, *inter alia*, that, independently of the surface ground, the net proceeds only of this species of property shall be payable.—*Northern Pac. Ry. Co. v. Mjelde, County Treasurer*, 287.

Mines and Mining Claims—Definition.

2. A "mining claim," as used in section 3, Article XII of the Montana Constitution, relating to revenue, *held* to be a tract of land to which a right of possession or the title has been acquired pursuant to the provisions of Congress relating to the disposition of mineral lands, including placer lands; and a "mine," independently of the surface, *held* to be a

veloped mining property yielding, or in a condition capable of yielding, revenue.—Northern Pac. Ry. Co. v. Mjelde, County Treasurer, 287.

Estates in Land.

3. The separate estates which different persons may own in the same land—as where one owns the surface, another the growing timber, and a third the mineral underground—may each be subject to taxation.—Northern Pac. Ry. Co. v. Mjelde, County Treasurer, 287.

Exemptions—Burden of Proof.

4. Taxation being the rule and exemption the exception, the burden is upon him who claims that his property is exempt, to allege and prove facts bringing it within the favored class.—Northern Pac. Ry. Co. v. Mjelde, County Treasurer, 287.

Estates in Land—Cash Value—Difficulty in Ascertaining not Criterion.

5. Difficulty which may confront the assessor in ascertaining the full cash value of an interest in real estate reserved by the grantor in himself in a deed conveying the land, may not be taken into account in determining whether such interest is subject to taxation.—Northern Pac. Ry. Co. v. Mjelde, County Treasurer, 287.

Revenue—Constitution—Construction.

6. Since the subject dealt with in section 3, Article XII of the Constitution, was revenue, any doubt as to the sense in which any term therein found was used by the framers of that instrument must be resolved in favor of a definition under which public revenue will be raised, rather than one which will defeat such purpose.—Northern Pac. Ry. Co. v. Mjelde, County Treasurer, 287.

TECHNICALITIES.

See, also, Variance, 4.

How Viewed by Courts.

1. Courts in adjusting rights will look at the substance of the particular transaction, rather than its technical aspects.—Barnes v. Smith, 309.

TENANCY IN COMMON.

See Mines and Mining, 3-7; Water and Water Rights, 12.

TENDER.

See Personal Injuries, 2.

THEORY OF CASE.

See Appeal and Error, 4, 7, 14.

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See Record on Appeal.

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See Amendments; Bills of Exception; Burden of Proof; Cross-examination; Discretion; District Courts; Evidence; Findings; Instructions; Jury; New Trial; Objections; Pleading and Practice; Theory of Case; Variance; Verdicts.

UNDERTAKINGS.

See, also, Bonds.

On appeal from justices' courts,—see Justices of the Peace, 3-6.

VACANCIES.

See Office and Offices, 1, 2.

VARIANCE.

See, also, Estates of Deceased Persons, 5.

Pleading and Proof—Waiver.

1. Where an action was tried in the district court on the theory that the pleadings were sufficient to admit certain proof for the purpose for which it was offered, the losing party will not be heard to assert, on appeal for the first time, that there was a fatal variance.—*Mosher v. Sutton's New Theater Co.*, 137.

Same—When Immaterial.

2. A variance between an allegation charging negligence on the part of defendant because of failure to employ reasonably competent fellow-servants, and proof that defendant kept such servants employed knowing of their unfitness because of intoxication, held too unsubstantial to warrant a reversal of the judgment in plaintiff's favor, where appellant did not during trial ask for relief on the ground of surprise, and witnesses in its behalf testified fully denying intoxication.—*Mosher v. Sutton's New Theater Co.*, 137.

When Immaterial—When Fatal.

3. Mere divergencies in detail in the proof from the allegation of a pleading are immaterial (Rev. Codes, sec. 6585); where, however, one contract is pleaded and another one is proved, or where the complaint alleges one breach of duty and the evidence establishes a different one, the variance amounts to a failure of proof (sec. 6587), justifying a nonsuit.—*American Livestock & Loan Co. v. Gt. Northern Ry. Co.*, 495.

Technicalities.

4. While matters of mere technicality are not looked upon with favor by the supreme court, the contention that because the rule requiring the pleadings and proof to correspond is, in a measure, technical and formal, it should be disregarded, has no merit, since its abrogation would not make for simplicity and justice, but result in confusion, delay and often in a denial of justice.—*American Livestock & Loan Co. v. Gt. Northern Ry. Co.*, 495.

VERDICTS.

Conclusiveness,—see, also, New Trial, 4.

Excessive.

1. Where plaintiff, by reason of a personal injury, sustained an incurable deformity, and suffered permanent impairment of earning capacity as a laborer, a verdict for \$7,150 held not excessive.—*Michalsky v. Centennial Brewing Co.*, 1.

When not Against Law.

2. Where negligence resulting in personal injury was charged in two particulars, only one of which was supported by the evidence, and the court instructed the jury to find for the defendant if negligence in the particular not proven had not been shown, a verdict for plaintiff, general in character, was not open to the charge that it was against law.—*Mosher v. Sutton's New Theater Co.*, 137.

Conflicting Evidence—Verdict Conclusive.

3. Where the verdict of the jury is based on conflicting evidence, it is conclusive on appeal.—*Western M. S. Co. v. Melzner*, 174.

In Claim and Delivery—Insufficiency.

4. A verdict in claim and delivery which does not respond to all the material issues tried is insufficient to sustain a judgment.—*Cuerth v. Arbogast*, 209.

Codefendants—Arbitrary Verdict as to One—Validity.

5. Where, in a personal injury action brought jointly against the employer and his agent or servant, the jury arbitrarily acquits the latter though the wrong complained of was done through his negligence, the verdict against the principal will nevertheless be allowed to stand.—*De Sandro v. Missoula L. & W. Co.*, 226.

General—Effect.

6. In a personal injury action tried by the court without the aid of a jury, a general finding in favor of defendant company is equivalent to a finding in its favor upon every issue necessary to support the judgment.—*Maronen v. Anaconda C. M. Co.*, 249.

Excessive Verdict—New Trial.

7. Where a verdict is wholly out of proportion to the wrong done and the cause of it and cannot be accounted for on any other theory than that it was measured by the passion and prejudice of the jury, a new trial should be granted.—*De Celles v. Casey*, 568.

WAIVER.

Disqualification of district judge,—see *District Courts*, 3.

Of assignments of error,—see *Briefs*.

Of irregularities in filing information,—see *Criminal Law*, 1.

Of estoppel,—see *Pleading and Practice*, 20.

Of right to administer estate,—see *Executors and Administrators*, 1, 4.

See, also, *Eminent Domain*, 3; *Variance*, 1.

WATER AND WATER RIGHTS.

See, also, *Irrigation Districts*.

Railroads—Ice Gorges—Removal—Liability for Damage.

1. While a railroad company must exercise the highest degree of care to keep its track and roadbed safe, it may not in so doing, even in cases of emergency, injure the property of an adjoining owner without rendering itself liable for the resultant damage; hence, refusal of an instruction that if removal of an ice gorge in a river near defendant's roadbed was necessary to protect it and a bridge crossing the stream, the plaintiff could not recover damages for the flooding of his premises occasioned thereby, was proper.—*Wine v. Northern Pac. Ry. Co.*, 200.

Same—Flood and Surface Waters.

2. Where water is forced out of the channel of a stream by an ice gorge, its character—whether surface or flood water as defined in *Fordham v. Northern Pac. Ry. Co.*, 30 Mont. 421—and the extent of the right of persons affected by its presence to deal with it, are dependent upon the facts as they are made to appear in each particular case.—*Wine v. Northern Pac. Ry. Co.*, 200.

Same—Removal of Obstruction—Liability for Damage.

3. Waters forced over the banks of a river by an ice gorge which, upon removal of the obstruction by defendant railway company, returned to the channel and became part of the torrent which inundated plaintiff's land lying below, were flood and not surface waters, and therefore, under the doctrine announced in *Fordham Case, supra*, defendant was liable for the damage caused to plaintiff, irrespective of any question of negligence.—*Wine v. Northern Pac. Ry. Co.*, 200.

Water Rights—Res Adjudicata—Evidence—Inadmissibility.

4. Where in a water right suit a decree of the United States circuit court had *inter alia* granted injunctive relief against interference with the right of one of the parties to a sufficient flow of water to

satisfy his claim, the presumption obtained that the court also determined that the waters of the creek in controversy did not sink and become lost before they reached the lands of such party; evidence to the contrary was, therefore, inadmissible, until a change in the conditions subsequent to the decree was shown.—*Howell v. Bent*, 268.

Same—Wrongful Diversions—Action for Damages—Misjoinder of Parties.

5. Under the rule that where two or more parties act each for himself in producing a result injurious to another, they cannot be held jointly liable for the acts of each other, nor, in the absence of statutory authorization, be sued in one action for the entire damage, either with or without an apportionment to each of his share of the damage, an action at law against several defendants jointly for injury to crops or account of the alleged wrongful diversion of the waters of a creek by the defendants severally did not lie.—*Howell v. Bent*, 268.

Same—Equity Actions—Statutes.

6. Section 4552, Revised Codes, authorizing plaintiff to make all persons who have diverted water from a stream parties defendant for the purpose of having the relative rights and priorities of all of them determined, and under which damages may be assessed against those who have wrongfully diverted any of such water, has reference only to a suit in equity in which the damages claimed are a mere incident, and not to an action at law of the character mentioned in paragraph 5 *supra*.—*Howell v. Bent*, 268.

Same—Implied Findings.

7. In a water right suit the presumption will be indulged, under the doctrine of implied findings, that the court found in favor of the prevailing party upon all the issues not covered by the express findings.—*Conrow v. Huffine*, 437.

Same—Extent of Right—How Measured.

8. While, as between claimants under prior and subsequent appropriations of water, the extent of the right of the first appropriator is measured by the capacity of his original ditch, the necessity for the use, and not the size of the ditch, is the measure of the extent of the right; after the use has been installed and the capacity of the ditch exceeds the amount required for reasonable use.—*Conrow v. Huffine*, 437.

Same—Duty of Water—Rule.

9. In the absence of legislative declaration on the subject, the rule in fixing the amount of water required for economical use for purposes of irrigation is to allow one inch per acre, unless the evidence discloses that a greater or less amount is required.—*Conrow v. Huffine*, 437.

Same—Allowance of Water—Convenience—Immaterial Consideration.

10. That a larger allowance of water than one inch per acre would more readily and conveniently enable a party to accomplish his work of irrigation is not any reason for making a larger award.—*Conrow v. Huffine*, 437.

Same—Acquisition of Rights—Extent, How Measured.

11. The extent of a right to the use of water acquired by purchase or otherwise is dependent upon the extent of the right at the time of its acquisition.—*Conrow v. Huffine*, 437.

Tenants in Common—Ditches—Cost of Maintenance—Actions—Complaint—Insufficiency.

12. One tenant in common may not charge the other with expense of repair or improvement of the common property, except when incurred with the latter's consent or, in case of necessity, upon prior notice and demand met with refusal to co-operate; hence the complaint in an action by a ditch owner to recover from his co-owner the latter's proportionate share of the cost of repair and maintenance

of the ditch, *held* not to state a cause of action in the absence of allegation of any of the matters referred to above.—*Manhattan Co. v. White*, 565.

"WHITE SLAVE" ACT.

See Criminal Law, 4.

WITNESSES.

See, also, Evidence.

Credibility—Conflicting evidence,—see Appeal and Error, 15.

Mileage and *Per Diem*.

1. The allowance of mileage and *per diem* to witnesses who were present and ready to testify for the objectors to the creation of an irrigation district and whose testimony would have been relevant, competent and material, was proper, though they were not subpoenaed, sworn or examined because of the dismissal of the petition for insufficiency.—*In re Gallatin Irrigation District*, 605.

Same.

2. Where a person was not called or examined as a witness, he was not entitled to fees, in the absence of a showing that his testimony could reasonably be offered as relevant, competent or material to the issues raised for trial.—*In re Gallatin Irrigation District*, 605.

WORDS AND PHRASES.

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